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May 8, 2019

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**AND FIRST CLASS MAIL**

Sandwich Board of Appeals  
16 Jan Sebastian Drive  
Sandwich, MA 02563

**Re: Opposition to Adventure Park at Heritage Museums and Gardens,  
LLC's Application for a Special Permit Submitted on April 23, 2019**

On behalf of the Highview Condominium Association ("Highview"), we provide this letter in opposition to The Adventure Park at Heritage Museums and Gardens, LLC's (the "Applicant" or "Adventure Park LLC") April 23, 2019 application (the "Application") for a special permit to operate an aerial adventure park project (the "Proposed Project" or "Aerial Adventure Park") on property that Heritage Plantation of Sandwich, Inc. ("Heritage") owns, located at 0 Pocasset Road and 0 Shawme Road (the "Property"). As is described below, numerous dispositive factual and legal bases require that the Board of Appeals (the "Board") deny the Application, including, among others, the following:

1. Consistent with State Regulations, ASTM standards incorporated by reference therein, and the Superior Court's August 27, 2019 ruling (the "Court Decision," a copy of which is attached as **Exhibit A**) in the previous litigation (the "Litigation") involving the Proposed Project<sup>1</sup>, the proposed Aerial Adventure Park constitutes an "Amusement Park" prohibited under Section 2210 (setting forth the Use Regulation Schedule) of the Sandwich Protective Zoning Bylaw (the "ZBL").
2. Even assuming, for purposes of argument only, that the nature of the Aerial Adventure Park's activities theoretically could constitute a "Recreation Facility" under the "Definitions" section of the ZBL, by the Applicant's/Heritage's own admission, and consistent with common sense and the plain terms and ordinary meaning of the relevant provisions of the ZBL, there is no reasonable dispute that the Aerial Adventure Park is not a "small-scale community" recreation facility, and therefore the ZBL expressly forecloses the application of Section 4150 and prohibits the Board from issuing a special permit for the Proposed Project.

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<sup>1</sup> Sullivan, et al. v. Heritage Plantation of Sandwich, Inc., et al., Barnstable Superior Court, Civil Action No. 1472cv-00560. The undersigned counsel served as counsel to the Plaintiffs in the Litigation.

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3. The Proposed Project also is ineligible for a special permit under the express terms of Section 4151 because it fails irreconcilably to satisfy several of the criteria that the ZBL requires as conditions precedent to the approval of a special permit under that section, including without limitation insofar as it:
  - a. Contains tree platform structures that are located within 100 feet of a property boundary line in violation of Section 4151(d);
  - b. Utilizes off-street parking that is located within 100 feet of a property boundary line and is not screened from a public way in violation of Section 4151(e) and Section 3540;
  - c. Contains outdoor light fixtures on Lot 1 in violation of Section 4151(b); and
  - d. Includes a concession stand within a permanent structure in violation of Section 4151(a).
4. Section 3540 likewise prohibits the Proposed Project because the “commercial” Aerial Adventure Park is not itself “screened from any adjacent residential use or district.”
5. In addition, the Aerial Adventure Park also fails to satisfy the other applicable conditions precedent to the approval of a special permit set forth in G.L. c. 40A, § 9 and Section 1380 of the ZBL, including to the extent that it:
  - a. Is not “in harmony with,” and to the contrary contravenes, “the general purpose and intent of the ordinance or by-law” in violation of G.L. c. 40A, § 9;
  - b. Would, as a result of “conditions peculiar to” the Proposed Project “but not generally true for similar permitted uses on other sites in [this R-1 Zoning] district,” produce visual and physical “nuisance, hazard or congestion;”
  - c. Would “for other reasons” cause “substantial harm to the neighborhood or derogation from the intent of the [ZBL], so that the stated district objectives” of “preserving current surrounding conditions and the environment of the community” under Section 2140 “will not be satisfied.” See ZBL, Sections 1330 and Section 2140;.
  - d. Would contradict various of the ZBL’s core stated objectives such as “[e]ncouraging the most appropriate use of land,” “[c]onserving the value of land and buildings,” “the conserving of natural resources and the preventing of blight and pollution of the environment,” and “[l]essening the congestion of traffic.” See ZBL, Section 1100.



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6. Nor would the Applicant be entitled to operate the Proposed Project in any event, even with a special permit, because, as the Town's predecessor Building Inspector previously determined, the Aerial Adventure Park's tree platforms constitute "structures" under the ZBL and state law, and are located within restricted setback areas and at heights exceeding 35 feet so as to require a variance.

For these reasons, and as further explained below, the Board should deny the Application.

**I. The Aerial Adventure Park is an Amusement Park Under the Section 2210 of the ZBL, and Accordingly is Prohibited in the Underlying R-1 Zoning District**

Section 2210 of the Zoning Bylaw prohibits in the R-1 District the use of property as an "Amusement Park." See ZBL, Section 2210. In its Decision the Court explicitly contemplated that the Aerial Adventure Park could constitute an "Amusement Park" under the ZBL. See Exhibit A, Sullivan, supra, 2018 WL 5881655, at \*11 ("Potentially applicable limitations include that the Bylaw does not permit an Amusement Park use in an R-1 District"). Although it was unnecessary for the Court to resolve this question in the Litigation, the Applicant cannot genuinely dispute that the Proposed Project is an Amusement Park under Section 2210 of the Zoning Bylaw. For example, 520 CMR 5.01 defines an "Amusement Park" as "[a] location that has 35 or more amusement devices that may be operated." In turn, this regulation defines an "Amusement Device" as, in relevant part, "[a] fixed or portable mechanical device similar to, but not limited to . . . rock walls, euro-bungee or similar devices . . . including . . . artificial climbing structures, as well as amusement devices as defined by ASTM." 520 CMR 5.01. In view of their nature and function, and consistent with ordinary experience and common sense, the Aerial Adventure Park's 69 zip line, rope, cable and bridge elements (which are known by labels such as "Flying Swing," "Surfs Up," "Mt. Rushmore Descent," "Trail by Trapeze," and "Spinning Logs"), are "similar to," and indeed are quintessential examples of, such devices. Trial Exhibit 55. Tellingly, notwithstanding the relatively recent vintage of aerial adventure parks in the United States, some states, such as Oklahoma, already have promulgated legal authority that explicitly includes the phrase "aerial adventure park" in defining "amusement rides." See, e.g., Oklahoma Department of Labor Memorandum dated March 24, 2014, a copy of which is attached as **Exhibit B** (stating that "Aerial Adventure Courses meet the definition of an 'amusement ride' under Oklahoma law"). Accordingly, the Board should find that the Aerial Adventure Park, with its collection of nearly double the regulatory threshold of 35 "amusement device" elements and other amusement devices, constitutes an "Amusement Park" under 520 CMR 5.01 and the ZBL<sup>2</sup>.

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<sup>2</sup> Even were the Board to conclude otherwise with respect to 520 CMR 5.01, insofar as Heritage's counsel stated at the Board's previous, October 28, 2014 hearing relating to the Aerial Adventure Park, that this state law definition of Amusement Park is not necessarily binding for purposes of interpreting the ZBL, as a necessary corollary of this proposition the Applicant admits that the Board could determine that the Proposed Project constitutes an



Similarly, the ASTM standards and definitions incorporated by reference into 520 CMR 5.01 expressly apply to aerial adventure parks. For instance, ASTM F2959-18 (Standard Practice for Aerial Adventure Courses, a copy of which is attached as **Exhibit C**) applies its requirements to “Zip Lines,” “Ropes Courses,” “Challenge Courses,” “Aerial Trekking Courses,” “Canopy Tours” and “Manufactured Climbing Walls” that, like the proposed Aerial Adventure Park project at issue in this case, are “operated for concession or commercial recreation.” See Exhibit C (ASTM F2959-18, Section 1.2) (emphasis added). Furthermore, the aerial adventure park industry readily recognizes that commercial aerial adventure parks are subject to regulation as amusement parks. In fact, in a recent White Paper addressing proposed revisions to the ASTM F2959-16 standard relative to aerial adventure courses, the Association for Challenge Course Technology (“ACCT”) recognized that “[a]ll [ASTM] F24 standards” (which standards ACCT describes as being “relative to amusement rides and devices”),<sup>3</sup> including F2959, are meant to be applied to concession and **commercial recreation**,<sup>4</sup> and lamented that “ACCT shares the concern of many within the ASTM community that some facilities (organizations) may be operating zip lines or other aerial adventure courses as amusement devices while **claiming not to be an amusement facility**.” See ACCT White Paper, Revision of ASTM F2959-16, August 2018 (a copy of which is attached as **Exhibit D**) (emphasis added).

Nor does the Applicant legitimately refute that the Aerial Adventure Park’s elements constitute “amusement devices.” To the contrary, Adventure Park LLC partner Outdoor Ventures has obtained amusement device licensing in connection with its aerial adventure park operations, including from the State of Tennessee. See, e.g., **Exhibit E**. Further, as various trial exhibits established, the Applicant contemplated availing itself of tax and overtime wage exemptions on the grounds that the Aerial Adventure Park is an “amusement park” (but presumably abandoned the idea because the Park’s operating schedule exceeded the maximum threshold allowed under such laws). See Plaintiffs’ Proposed Findings and Rulings submitted at trial (a copy of which is attached as **Exhibit F**)<sup>4</sup>, ¶¶ 188-190.

Although at the Board’s October 28, 2014 hearing Heritage contended that the Aerial Adventure Park constitutes a “challenge course” under 520 CMR 5.01 rather than an “amusement park,” this proposition is flat wrong, nor can the Applicant viably maintain it currently in view of the Court Decision. For instance, 520 CMR 5.01 defines “Challenge Course” as “[a] facility or facilities not located in an amusement park or carnival consisting of

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“Amusement Park” regardless of how it interprets 520 CMR 5.01. See video of Board of Appeals’ meeting of October 28, 2014, at approximately the one hour, 55 minute and 23 second (1:55:23) mark.

<sup>3</sup> As the White Paper noted, “F24 Committee” that develops the “F24 standards” “is responsible for developing and maintaining standards for amusement rides and devices.” Exhibit D (ACCT White Paper, p. 1).

<sup>4</sup> To avoid inundating the Board with unduly voluminous paper submissions, or exceeding size limits on electronic transmissions, in lieu of attaching copies of trial exhibits Highview attaches the Proposed Findings and Rulings that the Plaintiff filed with the Court on December 4, 2017, which Findings and Rulings include the relevant evidentiary cites. Of course, upon request Highview would be happy to provide the Board with copies of any of trial exhibits or testimony.



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one or more elements that challenge participants as part of a supervised educational/recreational curriculum.” Needless to say, the Aerial Adventure Course experience is wholly devoid of any bona fide or “supervised educational/recreational curriculum.” See Exhibit A, Sullivan, supra, 2018 WL 5881655, at \*4 (“Once tree borne, the climbers are on their own, with no further instruction provided.”). As a result, the Board should reject the Applicant’s anticipated argument in this regard and deny the Application on the grounds that the Aerial Adventure Park is an Amusement Park prohibited under Section 2210 of the ZBL.

**II. The Aerial Adventure Park is not a “Small-Scale Community Recreation” Facility and Therefore is Ineligible for a Special Permit Under Section 4150**

Even if the ZBL omitted its R-1 District prohibition of Amusement Parks such as the Aerial Adventure Park, and further assuming, for purposes of argument alone, that the Aerial Adventure Park theoretically could be construed to constitute a “Recreation Facility” under the “Definitions” section of the ZBL, still the Proposed Project would not be entitled to a special permit under Section 4150 of the ZBL because the Aerial Adventure Park could not reasonably be interpreted to constitute a “small-scale community recreation” facility. On its face the Proposed Project patently exceeds in size, scale, nature and scope what might plausibly be construed as a “small-scale” facility. Other provisions of the ZBL likewise belie such an interpretation. For instance, in defining the term “Spa” the ZBL clarifies its intended meaning of “small-scale outdoor recreation,” by characterizing the latter as “tennis courts, croquet courts etc.” See ZBL, Definitions section (referencing “small scale outdoor recreation **such as tennis courts, croquet courts etc.**”) (emphasis added). Needless to say, the Aerial Adventure Park is not remotely comparable or akin to a tennis court or croquet court, either in nature or the volume of customers or participants.

In fact, the Applicant steadfastly has regarded and marketed the Aerial Adventure Park as a “lucrative” and regionally impactful “economic development project,” aimed at achieving “financial success for the operator,” with the capacity to drive tourism not only in Sandwich but throughout Cape Cod generally by serving as a “premier outdoor recreational destination”. See Exhibit F, Proposed Findings and Rulings, ¶¶ 9, 31, 33-34, and 144; Id. at 38 (citing an online article in which an Applicant director described Outdoor Ventures’ parks such as the Aerial Adventure Park as “non-team building, pay-to-play stuff” in observing that “virtually everybody is now dependent on the revenue that can be generated from the non-team building, pay-to-play stuff.”). In accordance with these objectives, Heritage and Outdoor Ventures agreed upon an area of geographic exclusivity within which they mutually agreed not to “open another adventure park.” Id. at ¶ 142. And to date the Applicant has satisfied and exceeded these expectations, generating nearly 20,000 annual climbers to the Aerial Adventure Park in 2015, and nearly or more than 30,000 climbers annually in subsequent years<sup>5</sup>. Climber counts tally merely the

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<sup>5</sup> While the Application reports 18,049 climbers for 2018, this volume is artificially low and unrepresentative because, as a result of the issuance of the Court Decision, the Aerial Adventure Park ceased operations in August of 2018, several months earlier than scheduled.



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ticketed climbers and exclude numerous other individuals who visit the Aerial Adventure Park as spectators, or people who accompany climbers to the Aerial Adventure Park without navigating the aerial courses. Given these factors, and the Aerial Adventure Park's history and future promise of substantial and increasing visitor volumes, the Board properly should find that Proposed Project is not a "small-scale community" use of the sort encompassed within the scope of the ZBL's definition of "Outdoor Recreation Facility."

Furthermore, as the Court found, consistent with its strong fiscal interests the Applicant intends to substantially expand the Aerial Adventure Park's scale and impact, and in view of the economic realities of this commercial operation the Board should assume such present or prospective intention regardless of any contrary desire that the Applicant professes out of expedience in the instant proceeding. Namely, the Court concluded expressly that the Applicant anticipates attracting **50,000 visitors** and "intends to construct three additional courses and offer night climbing up to and including 10:00 p.m., which will substantially increase the number of the AAP's customers and, consequently, the traffic on the roads." Sullivan v. Heritage Plantation of Sandwich, Inc., No. 1472CV00560, 2018 WL 5881655, at \*4 (Mass. Super. Sept. 10, 2018). This finding is binding on the Board consistent with incontrovertible principles of collateral estoppel. See, e.g., Fireside Motors, Inc. v. Nissan Motor Corp. in U.S.A., 395 Mass. 366, 372 (1985) ("[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."), quoting Restatement (Second) of Judgments § 27 (1982). Abundant evidence at trial supported this finding, and it would be naïve to suspect that the Applicant might intend any different approach in view of its admitted economic need to expand the Aerial Adventure Park and operate at night. For instance, an illustrative sampling of such evidence reflects as follows:

1. At the Adventure Park LLC's Board of Directors meeting on March 18, 2016, the Board discussed that there would be "[n]o improvements nor any expansion due to litigation," and that "courses should be expanded and briefing stations and practice lines improved in the future." See Exhibit F, Proposed Findings and Rulings, ¶ 252.
2. The Board continued this dialogue at its ensuing quarterly meeting of July 7, 2016, discussing that "[t]he only way to increase climbers and ultimately the balance sheet is to expand the park and its courses." Id. at ¶ 253.
3. During the Board's discussion of the "Status of HAP improvements" at its October 6, 2016 meeting, one of the Applicant's Directors and signatory to the Application, Bahman Azarm, "brought up that [Adventure Park LLC/Outdoor Ventures] would like two more briefing stations," and the Board discussed that "HAP has delayed improvements up until now . . . [i]f and when we can increase the courses of the park revenue will increase significantly. This is slated to happen in 2018, but all parties are willing to do this earlier if possible." Id. at ¶ 256.



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4. On September 19, 2017, several months after receiving Plaintiffs' proposed findings summarizing all of the evidence that Heritage and Outdoor Ventures intend to expand the Aerial Adventure Park's operations, Heritage served documents disclosing to the Plaintiffs that it "is contemplating adding three new courses to the Adventure Park," for a total of eight courses. Id.
5. Independent of its intent to add aerial courses and expand the Park, to continue to grow Climber volumes the Adventure Park LLC intends to increase Park capacity by adding harnesses and briefing stations, and truncating the duration of a Climber's visit. At its quarterly meeting on March 18, 2016, the Adventure Park LLC's Board discussed that "HAP's funnel size for reservations will be 10 people every 15 minutes," and that "HAP's funnel size is driven by harnesses (max. capacity) and infrastructure (briefing stations)." Id. at ¶ 257-258 and 264.
6. Outdoor Ventures and the Adventure Park LLC also intend to continue to expand the Park's hours of operation. For example, on March 11, 2015, several months after the Plaintiffs commenced the Litigation, the Applicant acknowledged that "We plan to offer night climbing in the future." Id. at ¶¶ 265-267.
7. Outdoor Ventures bemoaned that out of political expedience Heritage had "put stuff on the street that will bite us if they continue to say it," such as "very [sic] low climber numbers, very low car counts, no mention of night climbing, etc.," and further emphasized that "[t]his park can not make real money without night climbing," that "[i]t is essential that we install lights," and that "[i]ts important that we not forget that success for HAP will require that we open earlier (8am) and stay open until 10 or 11." Id. at ¶¶ 272, 275-276, 281 & 287.
8. Internally the Applicant freely admitted that it was "trying to limit our hours of operation because of the lawsuit" only. Id. at ¶ 285.
9. Adventure Park LLC Board meeting minutes reflect that the Applicant has contemplated that the hours of operation would "be expanded in steps (i.e., extend to begin at 8a in 2016 and then more in future years)." Id. at ¶ 287.
10. At trial in October of 2017, Mr. Azarm testified that Outdoor Ventures and Heritage prospectively "are going to be discussing [night climbing] to see how and if we're going to be doing it" and that "it will definitely be a discussion between" Heritage and Outdoor Ventures. Id. at ¶ 294. He further testified that as part of its night climbing operations, Outdoor Ventures features "music and other lights that dance to the music, with the different colors and so on . . ." Id. at ¶ 297.

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In addition to reflecting the Applicant's inevitable desire to continue to expand the Proposed Project prospectively, this evidence underscores the current and growing breadth, heft and scale of the Aerial Adventure Park's physical layout, visitor volume and commercial impacts. For these reasons, among others addressed herein or at the hearing in this matter, the Board should deny the Application.

**III. Even Were it "Small-Scale," the Aerial Adventure Park Would be Ineligible for a Special Permit Because it Fails to Satisfy the ZBL's Required Criteria**

Even assuming, for purposes of argument, that the Proposed Project theoretically could qualify as a "small-scale community recreation" facility (and, as described above, it cannot), the Proposed Project also is ineligible for a special permit under the express terms of Section 4151 because, as the Applicant's project plans reflect, the Aerial Adventure Park fails irreconcilably to satisfy several of the criteria that the ZBL requires as conditions precedent to the approval of a special permit under that section, including without limitation insofar as:

1. The Aerial Adventure Park **contains multiple "structures" that are located within 100 feet of a property boundary line in violation of Section 4151(d).** Namely:
  - a. The Proposed Project features several **tree platform structures** that are located **well-within Section 4151(d)'s prohibited 100-foot setback area.** As is explained below in Section V, in 2014 the Town's then-Building Commissioner, Paul Spiro, correctly concluded that the Aerial Adventure Park's tree platforms (which are affixed to trees on each of the underlying aerial courses) constitute "structures" under the ZBL. Although Mr. Spiro later purported to reverse his conclusion to give Heritage's CEO "the impression that we are helping her along with the project by not denying and having her go before the ZBA requesting an appeal of my zoning opinion; which I believe would not get overturned," and to avoid "add[ing] more time to the permit process," Mr. Spiro's initial and actual conclusion was correct. See Exhibit F (Plaintiffs' Proposed Findings and Conclusions, ¶ 179). Nor can the Applicant genuinely dispute that the Aerial Adventure Park's tree platforms constitute "structures" under state and local law. For example, the State Building Code defines "structure" as "that which is built or constructed," 780 Code Mass. Regs. §202.0, and similarly the ZBL defines "structure" in relevant part as "[a]nything constructed or erected, the use of which requires fixed location on the ground, or attachment to something on the ground, including all buildings, mobile homes, billboards, towers, swimming pools or tanks that have a capacity of 4,000 gallons or more, or the like, or part thereof." It is self-evident that the Park's tree platforms satisfy these definitions. **The Applicant essentially admits this in agreeing that the "elevated platform [of] 240 feet from which the ropes courses begin" constitutes a "structure."** See Application Addendum, p. 3. In applying the definition of the term "structure" in



this regard, the Applicant's admitted "elevated platform" structure cannot meaningfully be distinguished from the elevated tree platforms. Because the Applicant's project plans reflect the existence of several such structures within 100 feet of the underlying Property boundary line in violation of Section 4151(d), the Board must deny the Application.

- b. In addition, and as an independent basis to deny the Application, the Aerial Adventure Park's yurts and elevated platform structure appear to be located within 100 feet of the boundary between Lots 1 and 2, in violation of Section 4151(d).
2. The Aerial Adventure Park **utilizes off-street parking that is located within 100 feet of a property boundary line and is not screened from a public way in violation of Section 4151(e)**. In this regard the Proposed Project also violates **Section 3540 of the ZBL**, which requires that "[p]arking areas of six (6) or more cars . . . shall be [] screened from any adjacent residential district or use and from any public way from which they would otherwise be visible." Of course, notwithstanding the Applicant's purported partial screening, the Aerial Adventure Park and its parking areas are prominently visible from a public way, Shawme Road, and from other property in the R-1 District.
3. The Aerial Adventure Park Property **contains multiple large outdoor light fixtures on Lot 1 in violation of Section 4151(b)**, which provides that such "[l]ighting is prohibited for fields and parking areas related to outdoor recreation facilities located in residential districts." The existence of these lights is indisputable, notwithstanding the Applicant's puzzling contention to the contrary in its Application.
4. The Aerial Adventure Park **includes a concession stand within a permanent structure in violation of Section 4151(a)**. Although the Applicant evidently now denies that it will operate any concession stand within a permanent structure, the Court noted the Applicant's use of one of the yurts to operate a "concession area." See Exhibit A, Sullivan, supra, 2018 WL 5881655, at \*4. Even if the Applicant intends to move such concession area from the yurt to an outside area, such a modification would run afoul of Section 3540's prohibition of unscreened "outdoor sales display areas."

In addition to these dispositive defects under Section 4151 of the ZBL, Section 3540 likewise prohibits the Proposed Project because the "commercial" Aerial Adventure Park is not itself "screened from" other areas of the R-1 Zoning District. See Section 3540 ("All **outdoor sales display areas** and all **commercial outdoor recreation** must be screened from any adjacent residential use or district by a wall, fence, or densely planted trees, or shrubs three (3) feet or more in height or be equivalently obscured by natural vegetation.") (emphasis in original). Based on these patent and dispositive violations of the required criteria enumerated in Sections 4151 and 3540 of the ZBL, the Board is required to deny the Application.

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**IV. The Aerial Adventure Park Fails to Satisfy  
Other Required Special Permit Criteria**

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In addition, the Aerial Adventure Park fails to satisfy other applicable conditions precedent to the approval of a special permit, including as set forth in G.L. c. 40A, § 9 and Section 1380 of the ZBL. It goes without saying that in an insular residential neighborhood located within a historic district and comprised of multiple scenic roads, a lucrative commercial Aerial Adventure Park, which the Applicant has itself described as “a relatively new recreational activity in the United States,” reasonably cannot be determined to be “in harmony with the general purpose and intent of the ordinance or by-law” as required under G.L. c. 40A, § 9. See Plaintiffs’ Proposed Findings and Rulings, ¶ 31. Further, as is self-evident and as abundant trial evidence reflects, the Aerial Adventure Park and its more than 75 amusement devices, aerial courses and other accoutrements and conditions “peculiar” to the Proposed Project, provide and generate inherently rampant visual and physical clutter, increased congestion on the area’s narrow and unpaved scenic roads, and other hazards and nuisances, including deleterious drainage impacts that the Old King’s Highway Regional Historic District Commission found to exist to confer standing in its March, 2016 appeal proceeding relating to then-proposed construction of parking and/or infrastructure facilities associated with the Aerial Adventure Park. Of course, notwithstanding this previously established impact the Application wholly omits any drainage analysis.

Nor in view of the Court Decision can the Board lawfully conclude otherwise or find an absence of “substantial harm to the neighborhood or derogation from the intent of the [ZBL]” under Sections 1330 and Section 2140 of the ZBL. Rather, pursuant to the axiomatic tenets of the collateral estoppel doctrine, **the Board is bound by the Court’s determination that “the plaintiffs [including Highview residents] have suffered a diminution in their property values of approximately 10%” as a result of the Aerial Adventure Park, amounting to tens of thousands of dollars per property.** Exhibit A, Sullivan, *supra*, 2018 WL 5881655, at \*7-8 (emphasis added); Fireside Motors, Inc., *supra*, 395 Mass. at 372. For this reason the Board must reject categorically the Applicant’s misplaced and invalid 11<sup>th</sup> hour attempt to proffer purported appraisal analysis to rebut contrary sworn expert testimony that the Court credited and endorsed. In any event, it is indisputable that the Aerial Adventure Park’s binding and Court-established diminution in property values and other impacts would contradict core ZBL objectives such as, among others, “[e]ncouraging the most appropriate use of land,” “[c]onserving the value of land and buildings,” “the conserving of natural resources and the preventing of blight and pollution of the environment,” and “[l]essening the congestion of traffic.” See ZBL, Section 1100. For these reasons the Board must deny the Application.

As further grounds requiring the Board’s denial of the Application, the Aerial Adventure Park violates numerous additional provisions of the ZBL. For example, among other violations:



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1. Several tree platform and lighting structures extend to at least 10 feet higher than the 35 foot maximum height allowed in an R-1 Zoning District under Section 2600 of the ZBL, and are located as close as 22 feet from the public way, in violation of the 30 foot minimum setback area set forth under Section 2600 of the ZBL. See Exhibit F (Plaintiffs' Proposed Findings and Rulings, ¶ 211.
2. The Aerial Adventure Park offers approximately 280 makeshift parking spaces on a large grass field area on the Property that has not been permitted as a parking area, is not properly screened by trees or otherwise compliant with the ZBL, and is accessed via an unapproved curb cut located along a Town-designated scenic road. Id. at ¶ 212; ZBL Sections 3100-3540).
3. The grass parking area is not an all-weather surface and includes parking spaces within the 20 foot minimum setback from Shawme Road in violation of Section 3130 of the ZBL. See Exhibit F(Plaintiffs' Proposed Findings and Rulings, ¶ 214.
4. As part of the Project's continued expansion, and even independent of it, Heritage and Outdoor Ventures have completed, and/or plan to complete prospectively, various further work in connection with the Aerial Adventure Park, including the alteration, discontinuance or reconfiguration of nearby roads and parking facilities, lighting installations and fencing. Id. at ¶¶ 308-310.
5. Aside from the invalidating procedural defects associated with the Certificate of Appropriateness ("COA") that the Historic District Committee issued relating to the Project on April 23, 2014, the Applicant has violated the COA by installing an Aerial Adventure Park substantially different from (indeed, bearing little resemblance to) the Project set forth in the plans that the Historic District Committee reviewed and ostensibly voted to approve.
6. For example, the drawing presented to and approved by the Historic District Committee showing the layout of the Project depicted the Aerial Adventure Park courses (comprising aerial zip lines, ropes courses and the like suspended in trees) extending across Shawme Road to 67 Grove Street, an entirely different parcel of land. Id. at ¶ 207. Such drawing also neglected to depict the size and location of two yurts and other associated structures, and the Committee was never presented with, and thus never approved, qualifying building plans as required. Id. at ¶ 208.

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7. In fact, after the Sandwich Historic District Committee issued the COA, and after the Building Commissioner issued the Building Permit, the Project plans were revised to, among other things: (a) move by approximately 200 feet the location of the yurt structures associated with the Project; (b) add decking; and (c) add a ramp. Id. at ¶ 210.

The Board must deny the Application based on these patent and indisputable violations of the Aerial Adventure Park's purported COA and the ZBL.

**V. The Aerial Adventure Park Requires a Variance**

The Board should deny the Application insofar as the Proposed Project would violate the ZBL in the absence of a variance for, among other things, the inclusion of several tree platform structures within the prohibited 30-foot setback area. Id. at 167. Mr. Spiro reached precisely this conclusion and maintained it steadfastly before acquiescing to political pressure. Id. at ¶¶ 155-162. Specifically, Mr. Spiro determined that the Aerial Adventure Park's tree platforms are "structures" that are required to comply with the 30-foot setback requirement set forth in the ZBL. He described this conclusion in a letter dated June 23, 2014, in which he stated "that the tree platforms . . . are structures." Id. at ¶¶ 155 (and trial exhibits and testimony referenced therein). Mr. Spiro noted that Heritage agreed with this interpretation, but contended that the platforms are not "buildings" and thus are not subject to the "Intensity of Use" requirements of the ZBL. Id. Mr. Spiro correctly rejected that argument, however, noting that "[s]ince our bylaw does not define what a 'building' is, I would refer to the definition of a building as defined in 780 CMR (Massachusetts Building Code) which is 'any structure used or intended for supporting or sheltering any use or occupancy,'" and further, "[t]he building code refers to a 'building' as any structure and the tree platforms are built with the intent of being used and occupied. It would be my building code interpretation that these platforms are buildings with that defined intent." Id. Mr. Spiro concluded his letter by noting that "[i]f the applicant is aggrieved by this interpretation, they have the right to apply for a variance and appear before the Zoning Board of Appeals as outlined in Section 1300 of the Sandwich Protective Zoning Bylaw." Id.

After discussing this issue with Mr. Spiro multiple times, the project's contractor advised that Mr. Spiro was "standing firm on the platforms in the trees as being a structure," and recommended that Heritage "start to prepare for a variance from the zoning board." Plaintiffs' Proposed Findings, ¶¶ 155-156. Heritage's attorneys similarly acknowledged that, to avoid the need for a variance, "Heritage will need to argue that the setback requirement does not apply to the remaining six platforms as they are not buildings or structures greater than thirty inches tall," and that "[t]his will be a difficult argument to make, and it is possible that a building permit would be denied, requiring a variance from the Zoning Board of Appeals." Id. at ¶¶ 165 (and trial exhibits and testimony referenced therein).



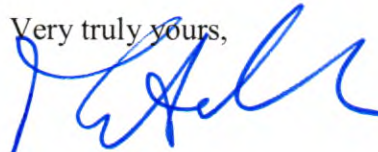
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Ultimately, after his boss, the Town Manager conveyed in emphatic terms his concerns about “being trashed and blamed” for Project permitting delays, being subject to pressure from Ms. Spear, and wanting to avoid being “left hanging from a non-supportive zip line,” Plaintiffs’ Proposed Findings, ¶¶ 154 and 159, Mr. Spiro reversed his opinion. Id. at ¶¶ 154-162. He explained to the Town Manager that he “hope[d]” to give Ms. Spear “the impression that we are helping her along with the project by not denying and having her go before the ZBA requesting an appeal of my zoning opinion; which I believe would not get overturned,” and to avoid “add[ing] more time to the permit process.” Id. at ¶¶ 161-162. For the reasons described above in Section III.1(a), Mr. Spiro’s initial and actual conclusion was correct. Accordingly, and because, as the Proposed Project plans demonstrate, the Aerial Adventure Park includes platforms within the 30-foot setback, the Project requires a variance. On this basis alone, the Board must deny the Application.

### **CONCLUSION**

For these reasons, Highview respectfully requests that the Board deny the Application. In addition, in presenting its opposition to the Aerial Adventure Park, and with profound respect for the Board and its instant review process, Highview conveys its confidence that the Board will review the Application objectively, notwithstanding that the Board itself was a defendant in the Litigation as required pursuant to G.L. c. 40A, § 17. While we noted with surprise an excerpt from the Board’s September 25, 2018 meeting minutes to the effect that in discussing the Court Decision the Board’s members were “all in agreement that the decision rendered by them was correct,” and respectfully disagree with such a sentiment (particularly insofar as in the Court Decision and at trial the Judge on multiple occasions characterized the Board’s previous decision as, e.g., “legally incorrect on its face,” “inadequate on its face,” “wrong,” and “facially invalid<sup>6</sup>”), Highview approaches this proceeding anew and expresses its optimism that the Board will satisfy its solemn duty to undertake an earnest and diligent review of the Application, unfettered by any allegiance to its prior invalidated decision. For the reasons described above, such a review will compel the conclusion that the Aerial Adventure Project is a prohibited Amusement Park and, even if otherwise, would be ineligible for a special permit as a “small-scale community recreation” facility, and Highview respectfully requests that the Board deny the Application accordingly.

Very truly yours,



Peter L. Mello

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<sup>6</sup> Upon request Highview would be happy to provide supporting trial transcript excerpts from the trial dates of October 18, 19 and 24, 2017.

# EXHIBIT A



35 Mass.L.Rptr. 281  
Superior Court of Massachusetts,  
Barnstable County..

Erin SULLIVAN et al.  
v.  
HERITAGE PLANTATION OF SANDWICH, INC.  
et al.

1472CV00560

Caption Date: August 27, 2018

File Date: September 10, 2018

29, 2014, the ZBA issued a decision denying the appeal. The plaintiffs have applied to the court for judicial review under G.L.c. 40A, § 17 and seek injunctive and declaratory relief.

A jury waived trial was held before the undersigned over multiple days in October, November and December 2017. Fifteen witnesses testified and 428 exhibits were admitted into evidence. The court, in the presence of counsel, took a view. Based on the credible evidence and reasonable inferences drawn therefrom and the view, the court makes the following findings of fact and rulings of law.

## FINDINGS OF FACT

Cornelius J. Moriarty, II, Justice of the Superior Court

### Introduction

\*1 On November 17, 2014, Erin Sullivan, Randolph Morgan, Nancy Andrews and Ursula Price (collectively plaintiffs) filed suit against Heritage Plantation of Sandwich, Inc., the Town of Sandwich, Paul Spiro ("Mr. Spiro"), in his capacity as the Town of Sandwich Building Inspector, and Harold Mitchell, Robert Jensen, Christopher Neeven, Erik Van Buskirk, James Killion and David Schrader in their capacities as members of the Sandwich Zoning Board of Appeals (ZBA). The complaint contained three counts: Count I seeks review under G.L.c. 40A, § 17; Count II seeks review under G.L.c. 240, § 14A,<sup>1</sup> and Count III alleges violation of G.L.c. 143, § 12.<sup>2</sup>

### Background

The Heritage Plantation of Sandwich, Inc. ("Heritage") obtained a building permit from Mr. Spiro to construct an outdoor adventure aerial park (AAP) as part of its facilities. Thomas Stanton ("Mr. Stanton") appealed the issuance of the building permit to the ZBA. On October

### Parties

Plaintiff Randolph Morgan ("Mr. Morgan") is the owner of a condominium unit located at 67 Highview Drive in Sandwich, Massachusetts. Plaintiff Ursula Price ("Ms. Price") is the owner of a condominium unit located at 63 Highview Drive in Sandwich. Both Morgan's and Price's condominium units are located within a complex known as the Highview Condominiums ("Highview"). As condominium unit owners, both Mr. Morgan and Ms. Price own a percentage interest in Highview's common areas. The common area abuts the property on which the AAP is located.

Plaintiff Erin Sullivan ("Ms. Sullivan") is the owner of a single-family home located at 7 Jonathan Lane in Sandwich. Plaintiff Nancy Andrews ("Ms. Andrews") is the owner of a single-family home located at 25 Pine Street in Sandwich.

Heritage is a Massachusetts nonprofit, charitable corporation organized pursuant to G.L.c. 180. It was incorporated on or about April 24, 1967. Ellen Spear ("Ms. Spear") is the President and Chief Executive Officer of Heritage. Heritage has operated the Heritage Museums and Gardens (HMG) in Sandwich for the last fifty years. It is located on a parcel of land approximately one hundred acres in size.

\*2 Heritage's Articles of Organization state the purposes

of the corporation as follows:

Creating, maintaining and operating in the Town of Sandwich in the Commonwealth of Massachusetts and in other towns on Cape Cod a museum or museums for the display to the public of antique buildings, works of art, household furnishings, machinery, equipment, weapons, hand carvings, artifacts, miniatures, boats, conveyances and other objects of historic interest; to educate the public in colonial and early American history and in the life and work of the early settlers and their descendants; to increase the knowledge and appreciation of the public of the American heritage; and to raise and expend funds for said purposes.

HMG's exhibits include collections of art, antique automobiles, and an antique carousel. Heritage also maintains acres of gardens principally displaying rhododendrons and hydrangeas. In 2011, Heritage opened a two-acre outdoor play area for small children called "Hidden Hollow." Also located on HMG's property is a licensed preschool, "The Hundred Acre School," which focuses on the STEM (Science, Technology, Engineering and Math) curriculum.

On November 7, 2013, Heritage's Board of Trustees adopted a written Master Plan, intending to develop new exhibits and update existing exhibits. The Master Plan provided, *inter alia*, that its objective was:

To develop a plan that advances Heritage's mission to inspire people of all ages to explore, discover and learn together, and to be true to our founder's charge that Heritage "be a living, outreaching force for education" which facilitates outdoor learning, discovery and social interaction.

One feature of the Master Plan was an "Aerial Adventure Area." Prior to the formal adoption of the Master Plan, Ms. Spear contacted Outdoor Venture Group, LLC ("OVG"), a developer of aerial adventure parks (AAPs) throughout the country, in order to gauge its interest in developing and operating an AAP on Heritage's property. OVG is a for profit commercial enterprise.

Eventually, OVG sent a proposal to Heritage wherein it proposed to develop an AAP consisting of eight aerial courses. Thereafter, OVG and Heritage entered into an agreement with respect to the development and operation of an AAP. To that end, two new corporate entities were formed, HMG, LLC and Adventure Park at Heritage Museums and Gardens, LLC ("AP, LLC"). HMG, LLC's sole member is Heritage, and its place of business is 67 Grove Street in Sandwich. AP, LLC's purpose is, in relevant part, "owning, constructing, and operating an educational, aerial adventure feature" on leased property at Heritage Museums and Gardens. AP, LLC has two members: HMG, LLC and OVG. OVG holds a 51% majority ownership interest while HMG, LLC holds a 49% ownership interest in AP, LLC. Bahram Avram, the president of OVG, is its manager.

Pursuant to the operating agreement, OVG has constructed and operated the AAP. It hires, supervises and pays all employees of the AAP. Heritage plays no part in the operation of the AAP and none of its employees are employed by OVG.

The leased property upon which the AAP was constructed is an approximately four-acre parcel designed as Parcels Nos. 1 and 2 on Sandwich Assessors Map No. 37. The AAP is located in a residential (R-1) zoning district. The neighborhood in which the AAP lies is encapsulated, in large part, by Route 130, a Massachusetts State Highway which loops around it. For local traffic, Route 130 provides a ready bypass around the neighborhood, which is accurately described as insular, private and scenic. There are approximately 280 homes and condominiums located within. Those traveling on the roads within the neighborhood are primarily either residents, visitors to the museum or the AAP, or otherwise lost.

\*3 Three streets, Shawme Road, Pine Street and Grove Street, provide access off Route 130. They are residential in nature. There are no sidewalks on Shawme Road or Pine Street. Shawme Road, in particular, is, in part, a narrow, winding, unpaved road with some area of pronounced drop offs and less than adequate guardrails. It is often used by residents of the neighborhood for walking and other forms of exercise.

#### The Permitting Process

The AAP is located in the Old King's Highway Regional



Historic District (“OKRHD”). The OKRHD was created by a Special Act of the Legislature, Chapter 470 of the Acts of 1973 (“the Act”). Section 4 of the Act established the Old King’s Highway Regional Historic District Commission (“the Commission”). Section 5 of the Act established separate Town Historic District Committees for nine individual towns, including Sandwich. Pursuant to Section 6 of the Act, no structure is allowed to be constructed within the district without a Certificate of Appropriateness (COA) from the local Historic District Committee (the “Committee”). Section 9 of the Act provides that the Committee is to give fourteen days notice by local newspaper publication and seven days notice to the owners of property abutting the premises of the application as they appear on the most recent tax list and date of the hearing.

Heritage applied for a COA on April 1, 2014 and the Committee held a hearing on the application on April 23, 2014. After the hearing, the Committee approved the application and issued COA # 14-43. The application incorrectly listed the address of the AAP as 67 Grove Street, assessor’s map 37, Lot 6. The correct address is 0 Pocasset Rd. Map 37, Lot 1 and 0 Shawme Road Map 37, Lot 2. Mr. Morgan and Ms. Price are not abutters to the property located on Map 37, Lot 6 and consequently did not receive notice of the application or the Committee’s hearing. They are, however, abutters to 0 Pocasset Rd. Map 37, Lot 1 and 0 Shawme Road Map 37, Lot 2.

Mr. Morgan learned of the issuance of the COA in early June 2014. Ms. Price learned of it somewhat later in September 2014. Neither contacted the Committee or the Commission, or sought an appeal to the Barnstable Superior Court.<sup>3</sup>

#### The Building Permit Applications

On April 24, 2014, Heritage submitted to Mr. Spiro an application for a building permit to construct the AAP and two yurts.<sup>4</sup> The building permit application again incorrectly listed the address of the AAP project as 67 Grove Street, Map 37 Lot 6. The application was at first denied “due to insufficient information.” Thereafter, Heritage supplied additional materials including proposed plot plans.

On September 18, 2014, Mr. Spiro issued a building permit authorizing the construction of the AAP (“the Building Permit”). Mr. Spiro originally thought that the

AAP would require a variance but subsequently altered his position after consulting with Town Counsel. In granting the permit, Mr. Spiro concluded that since the AAP was located in Residential 1 Zoning District, it was allowed by right as a museum use as permitted by Section 2300, Table of Uses of the Zoning ByLaw. He also concluded it was entitled to the protections of the Dover Amendment, G.L.c. 40A, § 3, as it had a significant educational component that would afford it an exemption from zoning use regulations.

\*4 On or about September 26, 2014, a Sandwich resident, Mr. Stanton, appealed Heritage’s Building Permit pursuant to G.L.c. 40A, § 8. The ZBA scheduled a hearing on Mr. Stanton’s appeal for October 28, 2014. Notice of the October 28, 2014 ZBA hearing was posted in *The Sandwich Enterprise* on October 3 and 10, 2014.

The ZBA scheduled a site visit on Saturday, October 25, 2014 and posted an agenda on October 22, 2014. The notice incorrectly identified the site as 67 Grove Street. However, the site visit was held at 0 Shawme Road and 0 Pocasset Road. Abutters Mr. Morgan and Ms. Price did not receive any notice of the site visit, did not know about it, and consequently did not attend. During the site visit, members of the ZBA posed questions to Ms. Spear about the location of the AAP. However, the members of the public who did attend were not allowed to ask questions and the members of the ZBA did not deliberate.

Mr. Morgan and Ms. Price received notice of the ZBA’s October 28th public hearing although neither chose to attend.<sup>5</sup> On October 28, 2014, the ZBA heard presentations from Heritage and members of the public. Following the presentations, the ZBA voted to close the public hearing and take the matter under advisement. Later that evening, it commenced deliberations and received an additional oral presentation from Mr. Spiro. It then voted unanimously to deny the Appeal. The ZBA filed a written decision, quite cursory in nature, which simply stated that the appeal “does not provide substantial evidence to overturn the decision of the Sandwich Building Inspector or demonstrate the lack of educational use of the property.” The decision was filed with the Sandwich Town Clerk on October 29, 2014. This appeal followed.

#### The Construction of the AAP

The AAP was constructed in late 2014 and early 2015



following the denial of the appeal by the ZBA. It opened for business on May 15, 2015. The original design called for eight aerial trails (“courses”) and the two yurts. However, only five courses and the yurts have been constructed to date. If successful in this litigation, AP, LLC intends to construct three additional courses and offer night climbing up to and including 10:00 p.m., which will substantially increase the number of the AAP’s customers and, consequently, the traffic on the roads.

The AAP is essentially an obstacle course in the trees. The five existing courses have varying levels of difficulty. The courses are akin to ski trails and are designated as yellow, green (2), blue, and black, according to the level of difficulty. There is a minimum age requirement for each level of difficulty. Each course consists of “bridges” between wood tree platforms. The platforms are constructed at different heights. The bridges are constructed of ropes, cables and wood. There is no motorized component. Climbers are attached to the cables by means of a harness and safety clip as they maneuver over the courses and through the trees. There are also nine zip lines within the AAP.

Prior to initial ascent, each climber must undergo a safety orientation of approximately thirty minutes duration. Each climber is instructed in the use of the harness and safety clip, and on how to climb and use the zip lines. After the orientation, the climbers begin their climb. The time it takes to complete a particular course depends on the individual climber’s agility and strength. A climber first chooses a particular course suited to his or her skill level, climbs to one of the platforms attached to the trees and progresses along the particular course. Once tree borne, the climbers are on their own, with no further instruction provided. When a climber completes a course, he or she may return to the starting point and repeat the particular course or choose a different one. Climbers are entitled to use the AAP for a total of two hours and thirty minutes including orientation. There are also two yurts constructed on the AAP grounds. One is devoted to administrative functions. The second houses equipment, the ticket office, and a small concession area.

\*5 Admission to the AAP requires the payment of an admission fee separate from the fee paid for admission to the HMG. In 2015, the daily admission fee for the AAP was \$43.00. The fee for the HMG was \$18. Combination tickets were available for \$53.00. The year 2017 saw a price increase of \$45.00 for admission to the AAP.

In its inaugural season, the AAP was open from May 15, 2015 until November 7, 2015 for a total of approximately 132 days. The hours of operation extended from 9:00 a.m.

to 6:00 p.m. Approximately 19,361 patrons visited the AAP that year. The vast majority, approximately 18,000, eschewed the combination ticket and purchased tickets only to the AAP.

In 2016, the AAP opened approximately one month earlier, on April 16, 2016, and remained open until November 13, 2016. The hours of operation were extended from 8:00 a.m. to 8:00 p.m. Approximately 31,145 patrons visited the AAP that season. Of those, approximately 29,250 visitors purchased individual tickets only. Only 1,889 visitors purchased a combination ticket. Approximately 35,000 climbers visited the AAP in 2017 and approximately 50,000 customers are projected to attend in 2018.

Heritage is acutely aware that in order to enjoy the protections of the Dover Amendment it must establish that the predominate use of the AAP is educational. To that end, it has employed three measures to inject the AAP with educational content. One such step was the annexation of five signs to trees along the aerial courses which Heritage contends teach principles of physics. The signs are small and contain brief statements regarding such topics as inertia and gravity. This court finds that these signs are, at best, of negligible educational value to the climbers who are hardly as concerned with principles of physics as they are for their safety and remaining aloft.

Heritage has also developed a dirt path (“the Ground Path”) on the land under the AAP. The Ground Path is delineated by a rope and is less than 10 feet wide. Along the Ground Path are 10 posts to which signs are attached which provide information about the trees, plants and insects which live in the forest. While these signs are of some educational value, the Court finds that the Ground Path, other than the fact that it lies under the AAP, has no discernible connection to it. Admission to the Ground Path is free and does not require the purchase of a ticket to the AAP. Customers of the AAP and HMG may, without charge, wander through the path if they so choose but are not required to do so.

As a third measure, Heritage has offered separate workshops to youth and school groups exclusively which it contends are part of the AAP. Each workshop costs \$11 to attend, a charge separate from the \$45 AAP admission charge. These offerings include workshops such as “Math Adventure” and “Eco Adventur.” Workshop attendees may attend the workshops without using the AAP and, conversely, may use the AAP without attending a workshop. Other than the fact that school or youth groups may purchase a ticket for both, there is no connection between the AAP and the workshops. Of the 28 school or



camp groups that visited the AAP between June 6, 2016 and July 2, 2016, none participated in a workshop.

### The Impact of the AAP on the Plaintiffs

The plaintiffs allege that the AAP has had a negative impact on them in three distinct ways: (1) an increase in traffic and congestion of the streets, (2) the proliferation of trash in the neighborhood; and (3) a diminution in their property values. Where plaintiffs allege several claims of aggrievement, they only need to satisfy their burden of proof with respect to one claim in order to establish standing. See *81 Spooner Rd., LLC v. Zoning Bd. of Appeals of Brookline*, 461 Mass. 692, 704 n.16 (2012); *Krafchuk v. Planning Bd. of Ipswich*, 453 Mass. 517, 523 n.13, (2009).

#### 1. Traffic

\*6 There are only three town roads, Grove Street, Pine Street and Shawme Road, which provide access to the neighborhood and the AAP. All parties agree that the AAP has resulted in an increase of traffic on the neighboring streets. The question is the degree of the impact.

The plaintiffs and the defendants each offered competing expert opinions on the effect of the increased traffic. The plaintiffs' expert, Kim Hazarvartian, compared the traffic counts on August 14, 2015, when the AAP was operational, with the traffic counts taken on December 4, 2015, when the Park was closed. His analysis suggested that over 600 vehicles trips per day were occasioned by the AAP. This court is not convinced of the reliability of his estimate or methodology, particularly in view of the limited data compiled and his failure to consider an adjustment for the increase of summer traffic on Cape Cod.

The defendants offered the testimony of Patrick Dunford. Mr. Dunford studied traffic counts and vehicle speed, and conducted roadway capacity analyses for 2015, 2016 and 2017. On August 28, 2015, the busiest day of those tested in 2015, there were 530 trips to and from (270 entering and 260 leaving) the parking field adjacent to the AAP. However, the AAP had only 160 climbers indicating that

some of those who parked in the grassy field patronized the museum.

Similarly, on September 2, 2016, there were 696 trips to and from (348 entering and 348 leaving) the parking field adjacent to the AAP. On that day the AAP had 198 climbers, again suggesting that patrons of HMG used the grassy field to park.

Prior to the 2017 season, Heritage constructed paved parking lots on once grassy fields across Shawme Road from the AAP. These lots were closer to the museum and as a result museum attendees were less likely to park on the grassy field adjacent to the AAP. As a result, in 2017, the number of vehicles entering the grassy field lot dropped. On August 11, 2017, there were 375 trips (187 entering and 188 exiting) to and from the grassy field. There were 327 climbers that day.

All of these figures provide but a bare bones basis estimate as to the amount of additional traffic generated by the AAP. There is no reliable data on the number of passengers per vehicle who entered any of the parking lots and patronized the AAP. On the other hand, there may have been visitors to the AAP who were not patrons but simply curious. I credit Mr. Dunford's testimony that only a small portion of the road capacity was utilized after the construction of the AAP and that there has been no appreciable traffic delays caused by the congestion of the streets. Even if one were to accept Mr. Hazarvartian's estimate of an additional six hundred trips per day, that amount of traffic is spread over three roads, albeit likely unevenly. However, if one were to assume that each road bore an equal amount of cars (200) over an eight-hour period that would amount to 25 cars per hour or one car per 2.4 minutes.

#### II. Trash

The plaintiffs also allege that there has been an increase in trash along Shawme Road due to the AAP. During the view, the court observed evidence of discarded items, such as nip bottles and styrofoam cups, along the road but to no greater degree than any other roadscape. Moreover, the plaintiffs have failed to establish any evidentiary nexus between the litter and the AAP.



### III. Loss of Market Value in the Plaintiffs' Properties

\*7 The plaintiffs offered expert testimony with respect to the loss of value of their homes due to the location of the AAP within the neighborhood. Surprisingly, Heritage did not offer expert testimony, but instead relied upon a vigorous cross examination of the plaintiffs' expert, Ellen MacDonald. Ms. MacDonald, whom this court finds to be an experienced and qualified real estate appraiser, compared the four subject properties with similar properties outside of the neighborhood. She opined that the properties suffered a loss in market value of approximately 10% after construction of the AAP, due to the increase in traffic and the introduction of a commercial enterprise into a residential neighborhood, particularly one that is viewed as rural, scenic and historic. I credit that opinion. Ms. MacDonald relied on MLS and Warren databases, which track sales through the town assessor's office and the registry of deeds. Ex. 416 and 417. She compared the four plaintiffs' properties with comparable properties and found that the plaintiffs' properties each had suffered a diminution in value resulting from the introduction of the AAP into the neighborhood. In particular, 63 Highview Drive suffered a loss in value from \$253,000 to \$230,000; 67 Highview Drive suffered a loss in value from \$250,000 to \$237,000; 7 Jonathan Lane suffered a loss in value from \$568,000 to \$477,000 and 25 Pine Street had suffered a loss in value from \$385,000 to \$325,000. Ms. MacDonald also testified credibly that properties in the neighborhood stayed on the market longer than properties in other areas of Sandwich leading to depressed selling prices and in some cases, withdrawal of the property from the market. Her testimony constitutes credible evidence which establishes that the fair market value of the plaintiffs' properties has been reduced by the AAP.

## RULINGS OF LAW

### I. PLAINTIFFS' STANDING

The first issue to be resolved is whether the plaintiffs have standing under G.L.c. 40A, § 17 to challenge the issuance of the Building Permit. "[O]nly a 'person aggrieved' has standing to challenge a decision of a zoning board of appeals." *81 Spooner Rd., LLC v. Zoning Bd. of Appeals of Brookline*, 461 Mass. 692, 700 (2012), quoting G.L.c.

40A, § 17. A person aggrieved is one who has suffered some infringement of his legal rights. *Id.* at 700.

Because they are statutorily entitled to notice of ZBA proceedings, abutters are entitled to a rebuttable presumption that they are aggrieved persons with standing to challenge a ZBA decision. *81 Spooner Rd., LLC v. Zoning Bd. of Appeals of Brookline*, 461 Mass. at 700; *Marshallian v. Zoning Bd. of Appeals of Newburyport*, 421 Mass. 719, 721 (1996). The parties agree that Mr. Morgan and Ms. Price, as abutters to the locus, are presumed to be "persons aggrieved." A defendant challenging the presumption of aggrievement must offer evidence warranting a finding contrary to the presumed fact. *Kenner v. Zoning Bd. of Appeals of Chatham*, 459 Mass. 115, 118 (2011). If the defendant does so, the presumption disappears and the court will determine standing based on all the evidence. *Id.*; *Marshallian v. Zoning Bd. of Appeals of Newburyport*, 421 Mass. at 721. The plaintiff then must present credible evidence, by direct facts and not speculative personal opinion, that his injury is special and different from the concerns of the rest of the community. *81 Spooner Rd., LLC v. Zoning Bd. of Appeals of Brookline*, 461 Mass. at 701; *Kenner v. Zoning Bd. of Appeals of Chatham*, 459 Mass. at 118.

Ms. Sullivan and Ms. Andrews are not abutters and do not enjoy the same presumption of standing. They must show some infringement of their legal rights causing more than minimal or slightly appreciable harm. *Kenner v. Zoning Bd. of Appeals of Chatham*, 459 Mass. at 121; *Marshallian v. Zoning Bd. of Appeals of Newburyport*, 421 Mass. at 721. To confer standing, the right or interest asserted by the plaintiff must be one that G.L.c. 40A or the ordinance or bylaw at issue is intended to protect. *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 30 (2006).

Further, "[t]he adverse effect on a plaintiff must be substantial enough to constitute actual aggrievement such that there can be no question that the plaintiff should be afforded the opportunity to seek a remedy ... Put slightly differently, the analysis is whether the plaintiffs have put forth credible evidence to show that they will be injured or harmed by proposed changes to an abutting property, not whether they simply will be 'impacted' by such changes." *Picard v. Zoning Bd. of App. of Westminster*, 474 Mass. 570, 573 (2016), quoting *Kenner v. Zoning Bd. of Appeals of Chatham*, 459 Mass. at 122. Credible evidence includes both a quantitative and a qualitative component. Quantitatively, the evidence must provide specific factual support for each claim of particularized injury made by the plaintiff. *Butler v. City of Waltham*, 63 Mass.App.Ct. 435, 441 (2005). Qualitatively, the



evidence must be the type on which a reasonable person could rely to conclude that the claimed injury likely will flow from the ZBA's decision. *Id.* Conjecture, personal opinion, and hypothesis are therefore insufficient.

\*8 Here, all of the plaintiffs, abutters and non-abutters alike, have put forth credible evidence to show that their interests have been injured or harmed by the AAP. Section 1100 of the Sandwich Bylaw provides in pertinent part:

The purpose of this Bylaw is to provide for the Town of Sandwich all of the protection authorized by the General Laws of the Commonwealth of Massachusetts, Chapter 40A and any amendments thereto—namely the promotion of the public health, safety, convenience and welfare by: ...

c. Conserving the value of land and buildings, including the conserving of natural resources and the preventing of blight and pollution of the environment.

d. Lessening the congestion of traffic.

The plaintiffs have endeavored to demonstrate that the increase in traffic and corresponding increased congestion of the three roads constitutes a substantial enough harm to entitle them to relief. While they have produced sufficient evidence to prove that they have been impacted, that is not enough. They must show that they have been more than minimally harmed. See *Kenner v. Zoning Bd. of Appeals of Chatham*, 459 Mass. at 121. Their evidence falls short in that respect.

However, diminution in property value can be a sufficient basis for standing where it is derivative of or related to cognizable interests protected by the applicable zoning scheme. *Id.* at 123. I credit the testimony of the plaintiffs' expert, Ms. McDonald, that the plaintiffs have suffered a diminution in their property values of approximately 10% due to the increase in traffic and the introduction of a commercial enterprise into a residential neighborhood. The neighborhood is rural, scenic and historic, and the AAP alters the character of the neighborhood. Heritage has not submitted its own expert testimony or otherwise shown that the plaintiffs' allegations of harm are unfounded or de minimis. See *Picard v. Zoning Bd. of App. of Westminster*, 474 Mass. at 573; *81 Spooner Rd., LLC v. Zoning Bd. of Appeals of Brookline*, 461 Mass. at 702-03. This court concludes that the plaintiffs successfully put forth credible evidence to establish that their injury is special and different from the concerns of the rest of the community. Accordingly, they have standing to appeal the ZBA's decision.

## II. MERITS OF THE APPEAL

Pursuant to G.L.c. 40A, § 17, the reviewing court hears the case, makes de novo factual findings based solely on the evidence admitted in court, and then, based on those facts, determines the legal validity of the ZBA's decision with no evidentiary weight given to any findings by the board. *Shirley Wayside Ltd. P'ship v. Board of Appeals of Shirley*, 461 Mass. 469, 474 (2012); *Roberts v. Southwestern Bell Mobile Sys., Inc.*, 429 Mass. 478, 485-86 (1999). First, the court must determine whether the ZBA acted in accordance with the proper standard or, instead, on a "legally untenable ground," requiring its decision to be vacated. *Roberts v. Southwestern Bell Mobile Sys., Inc.*, 429 Mass. at 486. In determining whether the ZBA's decision was based on a legally untenable ground, the court must analyze whether it was decided on a standard, criterion, or consideration not permitted by the applicable statutes or by-laws. The approach is deferential only to the extent that the court gives "some measure of deference" to the local board's interpretation of its own zoning by-law. In the main, though, the court determines the content and meaning of statutes and by-laws and then decides whether the ZBA has chosen from those sources the proper criteria and standards to use in deciding to approve the grant of the building permit. *Shirley Wayside Ltd. P'ship v. Board of Appeals of Shirley*, 461 Mass. at 474-75.

\*9 Second, even if the proper standard was applied, the court must ascertain, on the facts the court has found, whether the ZBA's decision was unreasonable, whimsical, capricious or arbitrary. *Shirley Wayside Ltd. P'ship v. Board of Appeals of Shirley*, 461 Mass. at 475. See also *Wendy's Old Fashioned Hamburgers of New York, Inc. v. Bd. of Appeals of Billerica*, 454 Mass. 374, 380-83 (2009). The question for the court is whether, on the facts the judge has found, any rational board could come to the same conclusion. *Shirley Wayside Ltd. Partnership v. Bd. of Appeals of Shirley*, 461 Mass. at 475. The judge should overturn the ZBA's decision when no rational view of the facts found by the court supports the ZBA's conclusion or if the reasons given by the board lack a substantial basis in fact and are in reality mere pretexts for arbitrary action or veils for reasons unrelated to the purposes of the zoning law. *Id.*



#### Improper Motive or Action by ZBA

The plaintiffs first contend that the Building Permit is invalid because the ZBA acted with improper motives. They rely on the Appeals Court statement that:

we assume, without deciding, that the board's approval of the subdivision plan would have to be annulled if it were shown that the approval was actuated by improper motives of the members of the board, such as a motive to do favors for friends, heedless of the consequences to the public.

*Arrigo v. Planning Bd. Of Franklin*, 12 Mass.App.Ct. 802, 811 (1981), rev. den., 385 Mass. 1101 (1982). However, "if a proper motive is essential to the regularity of the official act, it follows from the presumption of regularity that the motive must be assumed to be proper until the contrary is shown." *Id.* "There is every presumption in favor of the honesty and sufficiency of the motives actuating public officers in the actions ostensibly taken for the general welfare." *Id.*; *Foster from Gloucester, Inc. v. City Council of Gloucester*, 10 Mass.App.Ct. 284, 294 (1980). Thus, a party asserting a claim of improper motive bears the burden of proof. *Arrigo v. Planning Bd. of Franklin*, 12 Mass.App.Ct. at 811; *Wheatley v. Planning Bd. of Hingham*, 7 Mass.App.Ct. 435, 448 (1979).

Here, plaintiffs claim that Mr. Spiro wrongfully issued the Building Permit in response to political pressure from the Town Manager. This presents a somewhat atypical situation, in that the plaintiffs inferentially allege that town officials exerted pressure on Mr. Spiro to issue the Building Permit, not as a favor to Heritage, but conversely, to get Ms. Spear, the President and CEO of Heritage, colloquially speaking, "off their backs." The evidence establishes that in acting as a determined advocate for the AAP, Ms. Spear was hard charging, persistent, and in the words of the Town Manager, "a pest." There was, of course, nothing wrong with her aggressive advocacy for her employer's cause. Moreover, although her personal style may have been off-putting to some, there is no credible evidence of any nefarious conduct on her part.

There is also nothing in the evidentiary record which remotely establishes any improper motive by Mr. Spiro or

the ZBA. Indeed, Mr. Spiro originally denied the application for want of sufficient detail, insisted on proper documentation, and sought the advice of town counsel on the issue of whether a platform was a structure within the meaning of the ByLaw. Based on the evidence, I find no improper motive or conduct on the part of any of the defendants. Because the plaintiffs have failed to rebut the presumption of regularity and cannot show that the approval was actuated by the improper motives of the zoning officials, there is no basis to annul the Building Permit.

#### Failure to Give Notice of Site Visit

\*10 Mr. Morgan and Ms. Price contend that their failure to receive notice of the ZBA's site visit requires annulment of the Building Permit. That site visit took place on October 25, 2014, in advance of the actual hearing on October 28, 2014. Plaintiffs argue that the site visit was the first part of the public hearing to which they were entitled to notice.

I conclude that the October 25, 2014 site visit was not a public hearing and that as such, notice was not required pursuant to G.L.c. 40A, § 11.<sup>6</sup> Site visits are frequently used by local boards as an information gathering exercise. *Gamache v. Acushnet*, 14 Mass.App.Ct. 215, 222 (1982). The purpose is to provide board members the opportunity to view the property in question and familiarize themselves with the attendant conditions. During the site visit, which lasted approximately one hour, members of the ZBA questioned Heritage's representatives regarding the location of the AAP and the claim that the AAP would be educational.

During a public hearing, the public is invited to attend and express their views either orally or in writing about the particular project at hand. See, e.g., *Milton Commons Ass'n v. Board of Appeals of Milton*, 14 Mass.App.Ct. 111, 115 (1982) (holding, in a case arising under G.L.c. 40B, that certain proceedings were not part of the public hearing because the public was not allowed to speak: "[p]ublic hearings end when the right of interested parties to present information is cut-off"). Those members of the public who attended the October 25, 2014 site visit were not allowed to participate. Accordingly, I conclude that the site visit was not part of a public hearing requiring notice.

In any event, a party must show that it is prejudiced by a



lack of mailed notice before it can attack a decision. *Kasper v. Bd. of Appeals of Watertown*, 3 Mass.App.Ct. 251, 257 (1975). Where, as here, imperfect notice is given but the aggrieved person can and actually does file their Chapter 40A claim in a timely fashion, the plaintiff must show prejudice resulting from the defect. See *Chiuccariello v. Building Comm'r of Boston*, 29 Mass.App.Ct. 482, 486 (1990) (“[s]uccessful attack on a board’s decision, in the face of actual notice but in the absence of statutorily required notice, should be restricted to circumstances where prejudice is demonstrated”); *Gamache v. Acushnet*, 14 Mass.App.Ct. at 219-20 (finding no prejudice where despite improper notice, plaintiff appeared at hearing with counsel).

\*11 The plaintiffs have failed to demonstrate such prejudice. Ms. Price and Mr. Morgan had notice of the ZBA’s October 28, 2014 public hearing but elected not to attend. Plaintiffs’ argument that their attendance at the site visit would have better prepared them for the October 28 hearing is unavailing when neither even made an effort to attend that public hearing. Accordingly, the failure to provide Mr. Morgan and Ms. Price with notice of the October 25 site visit does not require annulment of the Building Permit.

#### Failure to Give Notice of Sandwich Historic Committee Hearing

The Plaintiffs further contend that this Court should annul the Building Permit because Mr. Morgan and Ms. Price did not receive notice of a hearing held by the Sandwich Historic District Committee on the issuance of a COA. As noted *supra*, under Section 9 of the Special Act creating Old King’s Highway Regional Historic District Commission, abutters are entitled to seven days notice of the hearing on an application for a COA. Under Section 11, a person aggrieved may appeal a COA to the Commission within twenty days and thereafter, may appeal the Commission’s decision to Superior Court within thirty days. See Stat. 1973, c. 470, §§ 9, 11. Here, where Mr. Morgan and Ms. Price never received notice of the hearing on the COA, they were unable to challenge its issuance through this appellate process.

However, the plaintiffs cite no authority, nor has this Court found any, for the proposition that the remedy for lack of notice of a hearing on a COA is annulment of a subsequently issued Building Permit. Rather, analogizing to the case law governing notice defects under Chapter

40A, the lack of notice tolled the limitation period for appealing the COA until the plaintiffs received actual notice of its issuance. See *Kramer v. Zoning Bd. of App. of Somerville*, 65 Mass.App.Ct. 186, 194-95 (2005). Mr. Morgan learned of the issuance of the COA in early June of 2014 and Ms. Price learned of it in September of 2014, but neither contacted the Committee or the Commission within twenty days, or sought an appeal to the Barnstable Superior Court. Having failed to do so, they cannot now launch a collateral attack on the COA in the context of appealing the Building Permit.<sup>7</sup>

#### Dover Amendment Protection

The ZBA upheld the Building Inspector’s determination that the issuance of a building permit was proper because the AAP was entitled to the protection of G.L.c. 40A, § 3 (“the Dover Amendment”), and therefore was not subject to any prohibition or limitation imposed by local zoning by-laws. Potentially applicable limitations include that the Bylaw does not permit an Amusement Park use in an R-1 District and permits an Outdoor Recreation Facility only by special permit granted under Section 1330 of the Bylaw.<sup>8</sup>

The Dover Amendment provides, in relevant part:

[N]or shall any [zoning] ordinance or by-law prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect or denomination, or by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.



\*12 G.L.c. 40A. § 3. The Dover Amendment strikes a balance between preventing local discrimination against educational uses and honoring legitimate municipal concerns that are expressed through local zoning laws. *Trustees of Tufts Coll. v. Medford*, 415 Mass. 753, 757 (1993).<sup>9</sup>

The Dover Amendment protects only those uses of land that have as their bona fide goal something that can reasonably be described as educationally significant. *Regis Coll. v. Weston*, 462 Mass. 280, 285 (2012). In addition, the educationally significant goal must be the primary or dominant purpose for the use of the land. *Id.*; *Whitinsville Retirement Society, Inc. v. Northbridge*, 394 Mass. 757, 760 (1985).

Education is a broad and comprehensive term that is not limited to traditional educational institutions. *Regis Coll. v. Weston*, 462 Mass. at 286. “It has been defined as ‘the process of developing and training the powers and capabilities of human beings.’ To educate ... is ‘to prepare and fit for any calling or business, or for activity and usefulness in life.’ Education may be particularly directed to either the mental, moral, or physical powers and faculties, but in its broadest and best sense it relates to them all.” *Whitinsville Retirement Soc., Inc. v. Northbridge*, 394 Mass. at 759. Purely recreational uses are not “educational.” *Regis Coll. v. Weston*, 462 Mass. at 287. While the AAP involves essentially a recreational use, it could be said to serve some, albeit minimal, educational purposes.

However, to be entitled to the protection of the Dover Amendment, the primary or dominant purpose of the AAP must be educational. This requirement helps ensure that a party invoking Dover Amendment protection does so without engrafting an educational component onto a project in order to obtain favorable treatment under the statute. *Regis Coll. v. Weston*, 462 Mass. at 290. Based on the evidence adduced at trial, any educational purposes of the AAP do not predominate over the recreational components so as to receive the protection of the Dover Amendment. The court must look beyond individual activities, some of which may in isolation constitute educational use, to see whether, in the aggregate, the overall use of the AAP is educational. The educational use must be the “primary or dominant purpose” of the land to qualify under the Dover Amendment. *Whitinsville Retirement Society, Inc. v. Northbridge*, 394 Mass. at 760.

Engrafting educational content onto the AAP is precisely what Heritage has endeavored to do here. Heritage has tried to satisfy the primary or dominant educational use requirement in three different ways: (1) by the annexation

of five signs to the trees which are alleged to describe principles of physics; (2) by the development of a ground path underneath the AAP; and (3) offering certain workshops to school groups. These minor educational components do not make the AAP a primarily educational use. Although the AAP includes some instruction, the safety orientation and the workshops, and some basic information about physics and plant and insect life, I conclude that the predominant use of the AAP is for recreational and exercise purposes which are not educational purposes under the Dover Amendment. The AAP offers an activity which is decidedly primarily recreational and athletic in nature. See *Metrowest YMCA, Inc. v. Hopkinton*, 2006 WL 1881885 at \*8 (Land Ct.) (although some instruction and classes were offered there, YMCA was used for predominantly recreational and exercise purposes and therefore was not entitled to Dover Amendment protection).

\*13 The evidence establishes that the AAP is marketed to the hard core athlete and active lifestyle enthusiast as opposed to the student. Marketed events such as “Dress Like Your Favorite Superhero Day,” “National Talk Like a Pirate Day,” “Selfie Saturday Photo Contest,” and “Singles Night,” none of which suggest serious educational content, demonstrate that the AAP is primarily recreational. A use that contains merely an element of education is insufficient to qualify for protection under the Dover Amendment. *Whitinsville Retirement Society, Inc. v. Northbridge*, 394 Mass. at 760 (nursing home which lacked formal instruction but at which residents engaged in crafts and other entertaining activities was not educational use). Because the primary goal of the AAP is not educationally significant and does not involve a nonprofit organization using its land for educational purposes, it is not exempt from the operation of the ByLaw under G.L.c. 40A, § 3. The ZBA therefore committed an error of law in upholding the Building Inspector’s determination that the AAP was entitled to the protection of the Dover Amendment.

#### Museum and Accessory Use

Heritage argues that the AAP is allowed by right as a museum use under the Sandwich Zoning Bylaw. Although the court gives some deference to local officials’ reading of their own bylaw, the construction of a zoning enactment is ultimately a judicial function and an incorrect interpretation is not entitled to deference. *Shirley Wayside Ltd. P’ship v. Board of Appeals of Shirley*, 461



Mass. at 475; *Duteau v. Zoning Bd. of Appeals of Webster*, 47 Mass.App.Ct. 664, 669 (1999). The Bylaw defines a museum as the “premises of the procurement, care and display of inanimate objects of lasting interest and value.” The AAP does not fit within this definition. In interpreting a zoning enactment, the court infers legislative intent from the plain language of the bylaw, giving words their common meaning and usage. *Lussier v. Zoning Bd. of Appeals of Peabody*, 447 Mass. 531, 534 (2006). The AAP is constructed of ropes, cables and wood. It decidedly is not an inanimate object of lasting interest and value. Given the nature of its construction and use, it is fair to infer that it depreciates daily. I credit the defendants’ assertion that the concept of a museum has evolved over the years, from the hidebound concept of a collection of antiques and stuffed animals to a more interactive approach. Nevertheless, the determinative fact here is that the Bylaw defines a museum quite narrowly. A conclusion that the AAP is permissible as a museum use is unreasonable based on the plain language of the Bylaw. Accordingly, the AAP is not permitted by right as a museum.

Heritage further posits that the AAP qualifies as an accessory use. Under the Bylaw, an accessory building or use is one “customarily incidental to and located on the same lot with the principal building or use, except that if more than 30% of the lot area is occupied by such use, it shall not all longer be considered accessory.” While the AAP is located on a parcel of land less than 30% of Heritage’s grounds, I cannot reasonably conclude that it is customarily incidental to the museum. See *Henry v. Board of Appeals of Dunstable*, 418 Mass. 841, 845 (1994) (incidental use is minor in significance compared to primary use and bears a reasonable relationship to it); *Harvard v. Maxant*, 360 Mass. 432, 438-39 (1971) (customary means commonly and by long practice established as reasonably associated with primary use, a use that is not unique or rare). First, the AAP is located on a different lot than the museum. Second, aerial courses, zip lines and related apparatus are not customarily incidental to an operation for the display of “antique buildings, works of art, household furnishings, machinery, equipment, weapons, hand carvings, artifacts, miniatures, boats, conveyances and other objects of historic interest.” Nor can the AAP fairly be said to “educate the public in colonial and early American history and in the life and work of the early settlers and their descendants or to increase the knowledge and appreciation of the public of the American heritage.”

\*14 In addition, Heritage’s employees are not involved in the day to day operation of the AAP. Generally, in order

to qualify as an activity accessory to a religious or educational institution, the members and staff of the institution are involved in the activity. See *Needham Pastoral Counseling Ctr., Inc. v. Board of Appeals of Needham*, 29 Mass.App.Ct. 31, 36, rev. den., 408 Mass. 1103 (1990). Finally, under the Bylaw, the accessory uses expressly permitted in an R-1 zoning district are an “accessory apartment,” “antenna,” “amateur radio accessory to residential use,” “camper storage accessory to residential use,” and “construction trailer office, temporary accessory.” The AAP does not fall under any of these uses. Thus, the AAP is not permitted as an accessory use to the operation of the HMG.

#### ORDER FOR JUDGMENT

It is *ORDERED* that judgment enter in favor of the plaintiffs on Counts I and II of the complaint. Because the ZBA acted arbitrarily and capriciously and on legally untenable grounds, its October 29, 2014 decision upholding the Building Inspector’s grant of a building permit to Heritage Plantation of Sandwich for construction of the outdoor adventure aerial park on Parcels No. 1 and 2 on Sandwich Assessor’s Map No. 37 is hereby *ANNULLED*.

It is further *ORDERED*, *ADJUDGED* and *DECLARED* that the outdoor adventure aerial park is not entitled to the protective treatment afforded under G.L.c. 40A, § 3 because its primary and dominant purpose is not educationally significant.

It is further *ORDERED*, *ADJUDGED* and *DECLARED* that the outdoor adventure aerial park is an unlawful use and the defendant Heritage Plantation of Sandwich, Inc. is hereby permanently enjoined from the continued operation of said aerial park.

It is *ORDERED* and *ADJUDGED* that no party is entitled to any award of fees, costs, sanctions or any other amount.

#### All Citations

Not Reported in N.E. Rptr., 35 Mass.L.Rptr. 281, 2018 WL 5881655

#### Footnotes

- 1 G.L.c. 240, § 14A permits a landowner to seek a determination of the extent to which a municipal ordinance or bylaw affects a proposed use or development of land.
- 2 G.L.c. 143, § 12 authorizes the Superior Court to restrain the construction or use of a building or structure in violation of any town bylaw or ordinance.
- 3 Section 11 of the Act provides for a further appeal from the decision of the Commission to the Barnstable Superior Court.
- 4 A yurt is a round, tent type structure usually covered with skins.
- 5 Ms. Sullivan and Ms. Andrews were not entitled to receive notice of the hearing.
- 6 Section 11 provides in relevant part: "In all cases where notice of a public hearing is required notice shall be given by publication in a newspaper of general circulation in the city or town once in each of two successive weeks, the first publication to be not less than fourteen days before the day of the hearing and by posting such notice in a conspicuous place in the city or town hall for a period of not less than fourteen days before the day of such hearing. In all cases where notice to individuals or specific boards or other agencies is required, notice shall be sent by mail, postage prepaid. 'Parties in interest' as used in this chapter shall mean the petitioner, abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within three hundred feet of the property line of the petitioner as they appear on the most recent applicable tax list ..."
- 7 This Court therefore need not address the plaintiffs' arguments that the COA improperly was issued based on incomplete drawings rather than an engineered plan and that the AAP includes structures visible from a public way that were not included in the COA.
- 8 The Bylaw defines a "Recreation Facility" as "Indoor or Outdoor sports facilities or athletic clubs including but not limited to, playing fields, courts, pools or ice rinks, rock climbing walls, or other sports areas, spectator facilities and other structures accessory to general athletics and recreation."
- 9 As an initial matter, Heritage does not operate the AAP. AP, LLC does. AP, LLC has two members: HMG, LLC and OVG. OVG holds a 51% majority ownership interest. It is a for profit company. The protections and benefits of the Dover Amendment are intended for nonprofit educational corporations. To allow the type of arrangement extant here would defeat the purpose of the statute and provide an easy end run around the nonprofit requirement.



# EXHIBIT B

# Oklahoma Department of Labor



Mark Costello  
COMMISSIONER OF LABOR

March 24, 2014

## MEMORANDUM

TO: Designers, Manufactures, Owners/Operators, and Auditors of Aerial Adventure Courses

RE: Standard Practice for Special Requirements for Aerial Adventure Courses

The purpose of this memorandum is to provide designers, manufactures, owners/operators, and auditors of aerial adventure courses with criteria and references for the design, manufacture, installation, operation, maintenance, modifications, and auditing of said courses.

Aerial adventure courses including zip lines, ropes courses, challenge courses, aerial trekking courses and canopy tours are among the fastest growing segments of the commercial recreational industry in Oklahoma. These activities include functional, operation and patron participation requirements now represented in the American Society for Testing and Materials (ASTM) International standards, ASTM F2959, Practice for Special Requirements for Aerial Adventure Courses.

Title 40, Oklahoma Statutes, Section §460 reads:

THE COMMISSIONER OF LABOR SHALL PROMULGATE RULES AND REGULATIONS FOR the safe installation, repair, maintenance, use, operation and inspection of ALL AMUSEMENT RIDES necessary FOR THE PROTECTION OF THE GENERAL PUBLIC using amusement rides. [*Emphasis added.*]

40 O.S. §461(1) reads:

"AMUSEMENT RIDE" MEANS A DEVICE OR COMBINATION OF DEVICES OR ELEMENTS THAT CARRY, CONVEY, OR DIRECT A PERSON OR PERSONS OVER OR THROUGH A FIXED OR RESTRICTED COURSE OR WITHIN A DEFINED AREA FOR THE PRIMARY PURPOSE OF AMUSEMENT OR ENTERTAINMENT. Amusement ride includes any amusement park device that uses treated water as the means of transportation, including the structure and water quality of the device. Amusement ride does not include the operation of articles of husbandry incidental to any agriculture operation or the operation of amusement devices of a permanent nature which are subject to building regulations issued by cities or counties and existing applicable safety orders [*Emphasis added.*]



Aerial Adventure Courses meet the definition of an "amusement ride" under Oklahoma law.

Oklahoma Administrative Code (OAC), Title 380, Chapter 55, Subchapter 9-2(d) [OAC 380:55-9-2(d)] sets forth the criteria to be used in inspecting amusement rides, to-wit:

CRITERIA FOR INSPECTION OF RIDES WILL BE BASED, AT A MINIMUM, UPON the ride manufacturer's specifications, industry consensus, common inspection practices, CRITERIA CONTAINED IN THE MOST CURRENT EDITION OF THE AMERICAN SOCIETY OF TESTING MATERIALS (ASTM) STANDARDS, and the Amusement Ride Safety Rules. Alterations to the ride manufacturer's specifications, by using aftermarket products, will be permitted provided that ride safety is maintained. Where no manufacturer exists or the manufacturer does not provide the Department of Labor adequate specifications, the Commissioner of Labor shall develop inspection criteria with input from owners, operators, the amusement ride industry and other jurisdictions. [*Emphasis added.*]

The Oklahoma Department of Labor (ODOL) will apply the ASTM F2959-12 (published January 2013) to the inspection and licensing of Aerial Adventure Courses within the state of Oklahoma.

- Point of Clarification:

*Applications listed under ASTM F2959-12 Section 1.3* shall comply with the criteria and references for the design, manufacture, installation, operation, maintenance, modifications, and auditing of said courses as recognized in ASTM F2959-12, the Oklahoma Amusement Ride Safety Statutes (40 O.S. § 460, *et seq.*), and the Oklahoma Amusement Ride Safety Rules (OAC 380:55) within the State of Oklahoma.

The ODOL is properly authorized to apply these ASTM standards to Aerial Adventure Courses so long as they are applied consistently and uniformly to all qualifying amusement ride owners and operators within the State of Oklahoma.

If you have any additional questions or concerns please contact the ODOL at 405/521-6100.

Respectfully,

James Buck, SSLD Director  
OKLAHOMA DEPARTMENT OF LABOR

# EXHIBIT C





Designation: F2959 – 18

## Standard Practice for Aerial Adventure Courses<sup>1</sup>

This standard is issued under the fixed designation F2959; the number immediately following the designation indicates the year of original adoption or, in the case of revision, the year of last revision. A number in parentheses indicates the year of last approval. A superscripted epsilon (ε) indicates an editorial change since the last revision or approval.

### 1. Scope

1.1 This practice establishes criteria for the Design, Manufacture, Installation, Operation, Maintenance, Auditing and Major Modification of Aerial Adventure Courses which occur(s) after the effective date of publication of this document except as noted in 1.3.

1.2 This practice applies to the following devices when operated for concession or commercial recreation:

- 1.2.1 Zip Lines.
- 1.2.2 Ropes Courses.
- 1.2.3 Challenge Courses.
- 1.2.4 Aerial Trekking Courses.
- 1.2.5 Canopy Tours.
- 1.2.6 Manufactured Climbing Walls.
- 1.2.7 Via Ferrata.

1.3 This practice shall not apply to the following:

1.3.1 Aerial Adventure Courses when operated exclusively under the following applications:

- 1.3.1.1 Educational curriculum.
- 1.3.1.2 Physical fitness purposes.
- 1.3.1.3 Organized competitive events.
- 1.3.1.4 Therapeutic programs.
- 1.3.1.5 Training purposes.
- 1.3.1.6 Team and confidence building.

1.3.1.7 Playground equipment covered by Consumer Safety Performance Specification F3487.

1.3.2 Amusement rides and devices whose design criteria are specifically addressed in another ASTM standard.

1.3.3 Portions of an Aerial Adventure Course unaffected by a major modification.

1.3.4 Upgrades to electrical wiring, electrical motors and electrical components of Aerial Adventure Courses provided the original design and safety criteria are maintained or enhanced.

1.3.5 Pre-existing designs for Aerial Adventure Courses that are installed after the publication date of this practice if the design is service proven or previously compliant as specified by 1.3.5.1.

1.3.5.1 Aerial Adventure Course designs may qualify as “previously compliant” for five years following the date of publication of this practice. Thereafter, an Aerial Adventure Course design must qualify as “service proven” as defined in Practice F2294 or meet the requirements of this practice.

1.4 This practice includes an annex (mandatory) which provides additional information (for example, rationale, background, interpretations, drawings, commentary, and so forth) to improve the user’s understanding and application of the criteria presented in this practice. The annex information shall be interpreted as mandatory design criteria.

1.5 This practice includes an appendix (non-mandatory), which provides additional information (for example, rationale, background, interpretations, drawings, commentary, and so forth) to improve the user’s understanding and application of the criteria presented in this practice. The appendix information shall not be interpreted as mandatory design criteria.

1.6 This standard does not purport to address all of the safety concerns, if any, associated with its use. It is the responsibility of the user of this standard to establish appropriate safety, health, and environmental practices and determine the applicability of regulatory limitations prior to use. Some specific hazards statements are given in Section 7 on Hazards.

1.7 This international standard was developed in accordance with internationally recognized principles on standardization established in the Decision on Principles for the Development of International Standards, Guides and Recommendations issued by the World Trade Organization Technical Barriers to Trade (TBT) Committee.

### 2. Referenced Documents

2.1 ASTM Standards:<sup>2</sup>

E543 Specification for Agencies Performing Nondestructive Testing

<sup>1</sup> This practice is under the jurisdiction of ASTM Committee F24 on Amusement Rides and Devices and is the direct responsibility of Subcommittee F24.01 on Adventure Activities.

Current edition approved Aug. 15, 2018. Published August 2018. Originally approved in 2012. Last previous edition approved in 2016 as F2959 – 16. DOI: 10.1533/STP.2019.124

<sup>2</sup> For referenced ASTM standards, visit the ASTM website, [www.astm.org](http://www.astm.org), or contact ASTM Customer Service at [service@astm.org](mailto:service@astm.org). For Annual Book of ASTM Standards volume information, refer to the standard’s Document Summary page on the ASTM website.

Most recent

# ASTM F2959-18

## Standard Practice for Aerial Adventure Courses

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1.3.1.4 Therapeutic programs.

1.3.1.5 Training purposes.

1.3.1.6 Team and confidence building.

1.3.1.7 Playground equipment covered by Consumer Safety Performance Specification F1487.

1.3.2 Amusement rides and devices whose design criteria are specifically addressed in another ASTM standard.

1.3.3 Portions of an Aerial Adventure Course unaffected by a major modification.

1.3.4 Upgrades to electrical wiring, electrical motors and electrical components of Aerial Adventure Courses provided the original design and safety criteria are maintained or enhanced.

1.3.5 Pre-existing designs for Aerial Adventure Courses that are installed after the publication date of this practice if the design is service proven or previously compliant as specified by 1.3.5.1.



1.3.5.1 Aerial Adventure Course designs may qualify as “previously compliant” for five years following the date of publication of this practice. Thereafter, an Aerial Adventure Course design must qualify as “service proven” as defined in Practice F2291 or meet the requirements of this practice.

1.4 This practice includes an annex (mandatory), which provides additional information (for example, rationale, background, interpretations, drawings, commentary, and so forth) to improve the user’s understanding and application of the criteria presented in this practice. The annex information shall be interpreted as mandatory design criteria.

1.5 This practice includes an appendix (non-mandatory), which provides additional information (for example, rationale, background, interpretations, drawings, commentary, and so forth.) to improve the user’s understanding and application of the criteria presented in this practice. The appendix information shall not be interpreted as mandatory design criteria.

*1.6 This standard does not purport to address all of the safety concerns, if any, associated with its use. It is the responsibility of the user of this standard to establish appropriate safety, health, and environmental practices and determine the applicability of regulatory limitations prior to use. Some specific hazards statements are given in Section 7 on Hazards.*

*1.7 This international standard was developed in accordance with internationally recognized principles on standardization established in the Decision on Principles for the Development of International Standards, Guides and Recommendations issued by the World Trade Organization Technical Barriers to Trade (TBT) Committee.*

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ASTM International [ASTM]

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# EXHIBIT D



ACCT WHITE PAPER  
REVISION OF ASTM F2959-16



**ACCT WHITE PAPER**  
Revision of F2959-16 Standard Practice for Aerial Adventure Courses  
ASTM BALLOT F24 (18-04)  
item #30 - WK #64323

As a follow up to the ACCT announcement released on July 18, 2018, the following information relates to the current ASTM International ballot to revise the F2959-16 standard to eliminate the exclusions from the scope of the standard. This ballot closes on August 13, 2018. Voting members of ASTM are encouraged to consider the impact of this change when casting their vote.

## HISTORY & IMPACT

The Association for Challenge Course Technology (ACCT) developed the first standards specifically for challenge courses, published in 1994, and is now an American National Standards Institute (ANSI) Accredited Standards Developer (ASD). This designation indicates that ACCT has an accredited standards development process that is open, fair, and allows for equal representation of materially affected parties. The current standards version is ANSI/ACCT 03-2016. ACCT is comprised of a nucleus of more than 3,000 members worldwide. Current membership includes people and organizations from the United States and Canada, Asia, Central and South America, the Caribbean, Australia, the Middle East, and Europe, and ACCT continues to develop a global alliance of like-minded organizations.

ACCT is the leading trade association for those working with and on behalf of the challenge course industry. ACCT members include owners, operators, designers, installers, inspectors, trainers, consultants, regulators, equipment manufacturers, educators, facilitators, camp professionals, students, and the public at large. Membership is open to all individuals who share a desire to serve, acting on behalf of and in the best interest of the challenge course industry.

Within ASTM International, the F24 Committee is responsible for developing and maintaining standards for amusement rides and devices. According to the ASTM website, the F24 Committee currently has responsibility for 19 standards, including the F2959-16 (Standard Practice for Aerial Adventure Courses). Originally published in 2012, the F2959 standard addresses aerial adventure and challenge courses used for amusement in amusement settings. To minimize confusion for regulators and support the purpose of F24 (that being to write standards for amusement rides and devices), the scope of the ASTM F2959 standard excludes courses used exclusively for purposes of education, therapy, fitness, and other non-amusement functions. When the ASTM F2959 standard was released it was the third set of standards developed for the challenge course industry.

In addition to ACCT being an ANSI ASD, another difference between ASTM F24 and ACCT is that the F2959 standard within ASTM focuses exclusively on amusement rides and devices, whereas ANSI/ACCT Standards encompass the entire spectrum of the challenge course industry. An analogy can be made within the bicycle industry. Some vendors are bicycle manufacturers, producing balance, road, downhill, mountain, touring, fat tire, and cruiser bikes, while others focus on just one type of bike. The 'standards' for a good road bike are different than for a downhill bike. And while there is some overlap (frame, wheels, handlebars) there are also some key differences. Those key differences are more than structural as they impact function and the end user's experience. A road bike used in downhill mountain biking is not only unpleasant, it is unsafe. Conversely, you can use a downhill bike on the road but a lot of efficiency is lost - it is the wrong tool for the job.



F2959 was initially created to identify special requirements for aerial adventure courses while referencing other core standards within the F24 committee. These core standards were written for traditional amusement rides and devices. The content of the current F2959-16 standard lists inclusions and exclusions to core standards that are applicable to aerial adventure courses, or describes a modified version of a core standard that is specific to aerial adventure courses. As an example, the design section of F2959 still lists inclusions and exclusions to F2291 (Standard Practice for Design of Amusement Rides and Devices) which discusses cars and restraint systems typical of roller coasters, with no reference whatsoever to harness systems. There has been minimal technical content balloted within F2959 since its original publication to bridge this gap or to develop language that recognizes the types of operating systems that are intrinsic to aerial adventure courses. While F24 is trying to develop a separate standard practice for aerial adventure courses based on their unique functional, operational, and patron participation requirements, the content of the F2959 standard is not yet at the level where it is usable by said courses. For example, the concepts of rider position and clearance envelope still refers to the diagrams of a person in a seated car.

The critical factor to consider is how different structures, and in great measure, different operating systems and delivery modes maximize safe operation. It is helpful to recognize that historically the Amusement Ride and Challenge Course industries have used two distinctly different approaches to risk mitigation. In the development of amusement rides, priority has been placed on creating devices (i.e. machines) that are designed and built to remove virtually all of the responsibility for safety from the patrons themselves. In contrast, Aerial Adventure/Challenge Courses are typically designed to deliberately involve participation during an experience. Risk is mitigated by employing highly trained practitioners to supervise the participants' performance and facilitate learning. Both approaches to safety have their strengths, but they are designed with different intent and therefore need to be applied appropriately. All Aerial Adventure/Challenge Courses should not be treated equivalently.

## ACCT POSITION

- ACCT and ASTM have a shared understanding that a misapplication of standards is detrimental to public safety.
- ACCT recommends that the exclusions remain in the scope of the F2959 standard, at least until alternate language and definitions\*\* are created for terms such as "concession", "commercial recreation", and "patron-directed". Additionally, ACCT urges the F24 Committee to continue to revise the F2959 content language to address challenge courses used in commercial or amusement ride applications such as zip line tours and aerial adventure/trekking parks. Once the standard better describes all the types of courses it applies to, the change in scope will occur naturally.
  - Historically the F2959 standard effort has focused solely on zip lines. The F24 family of standards might not be considering the multitude of operating systems and delivery modes that exist within the Aerial Adventure/Challenge Course industry. Developing a standard that will be applied to these systems without considering these systems in the development of the standard itself will have negative impact upon attempted application.

- ACCT's position on regulation remains focused on the following essential points as noted in the 2017 ACCT Position Paper regarding regulation:
  - Agencies should view ACCT as a valuable and helpful resource as they consider or begin to develop a regulatory framework for the industry in their states, provinces, or jurisdictions.
  - Stakeholder and owner/operator involvement is essential and should be incorporated at an early stage in the development of regulations. Without the involvement and help in understanding the industry (i.e. industry specific technical terms and definitions, how challenge courses operate, current risk management practices, etc.), regulators risk developing policies that have unanticipated and potentially harmful consequences, which ultimately do not ensure public safety.
  - Authorities Having Jurisdiction (AHJs) that regulate the challenge course industry are in a unique position to ensure compliance with consensus-based standards, and are entrusted by their constituents to ensure end user, consumer, and worker safety.
  - The conventional Amusement Device regulatory framework alone (most commonly based on ASTM 2291) is inadequate in ensuring public safety in the Aerial Adventure/Challenge Course Industry.
  - The F2959-16 standard along with the ANSI/ACCT 03-2016 are resources for regulators looking to develop legislation.

## COMMENTS ON THE ASTM BALLOT

Within the ASTM standards development process, voting members are able to comment on ballots as a method of communication and having one's voice heard.

There were three rationales within the ballot discussing the desire to remove the exclusions. Below are some additional thoughts on each item:

***Rationale: There are other Aerial Adventure/Challenge Course industry standards that do not list exclusions***

Within ASTM, and more specifically F24 Amusement Rides and Devices standards there are exclusions listed. As an example, F2291-17 lists exclusions including patron directed amusement rides and artificial climbing walls.

Standards are written with a specific scope and application in mind. The F24 Committee recognizes that all amusement rides cannot be contained within one standard and have over time developed standards specific to ride/device types - such as a standard for inflatables. The reason for the variety of standards is the applicability of a specific standard to a specific ride/device. The "formula" (standard) does not fit if one is measuring forces and loads on a water slide vs. a roller coaster vs. a bumper car. ACCT also recognize these differences for aerial adventure/challenge courses and address when to apply (or exclude) under a different format within ANSI/ACCT Standards.



All F24 standards, including F2959, are meant to be applied to concession and commercial recreation. An unintended side effect of removing the exclusions is that regulators may apply this standard to all aerial adventure/challenge courses without understanding the intended scope of the F24 standards (amusement rides), or their applicability to a particular course. In the meantime, the current F2959-16 exclusion is a simple means of differentiation.

***Rationale: There are facilities listed in the exclusions that operate a commercial/concession aerial adventure course***

ACCT shares the concern of many within the ASTM community that some facilities (organizations) may be operating zip lines or other aerial adventure courses as amusement devices while claiming not to be an amusement facility. This needs to be addressed and it is important to recognize that rather than stemming from the existence of exclusions listed in F2959, the issue stems from the decisions of individuals who choose to attempt to skirt the requirements of the standard. Removing the exclusions will not resolve this issue. Instead, standards users - including regulators - need to be educated to read properly the existing language of F2959-16 wherein the exclusions state "when operated exclusively under the following" (goes on to list excluded programs such as for therapeutic purposes).

The challenge within the current ballot is that it is difficult to distinguish the intent of a structure by its appearance alone, including how it should be regulated and which standard best applies. The mere presence of wood, wire rope systems, and trolleys on an aerial adventure course does not define or determine its purpose and use. This is one of the concerns surrounding the removal of the exclusions from F2959. This decision would change the scope of the standard, resulting in its misapplication to devices, structures, and courses for which it was not specifically designed. By virtue of its position within the F24 body of standards, F2959 is intended solely for amusement rides and devices.

Often aerial adventure courses that fit into one of the proposed exemptions are part of a larger organized group experience, frequently involving structured lesson or treatment plans with desired goals and outcomes. The participation in the activity is followed up with purposeful processing and debriefing to reflect not on the activity itself but on the actions, reactions, and interactions of the participants.

Removing the exclusions in ASTM F2959 without defining the terms "commercial recreation" or "concession" leads to confusion. Therefore if it looks like a participant is having fun (a potential by-product of any recreational activity), or the structure looks like a neighboring venue, or we look at a profit status as a determinant (which is not recommended) the standard might be misapplied. Eliminating the exclusions may actually further confuse the issue. While the intended purpose of the ballot is not to change the scope of the F2959 standard, it has the potential consequence of doing exactly that.

Current F2959-16 content still utilizes a lot of language from F2291, the design standard for amusement rides such as roller coasters, and there is minimal or no language regarding the human factor inherent in many aerial adventure courses. Education and teaching programs have intentionally chosen the human factor. The intent and outcomes of team building cannot be generated within amusement ride systems. "Human managed procedures" are critical to providing participants with the intended experience. Similar to the differences between having people ride a mass transit bus vs teaching individuals to drive a car - while fewer cars on the road may statistically be safer, buses do not accomplish the goal of teaching skills competency, etc.

Additionally, amusement Operators are far different from Facilitators and Guides, even in the example that people move when facilitated or guided vs the ride moving (with operators overseeing). Facilitators are often trained professionals such as teachers, therapists, counselors, or rope access technicians. A Facilitator takes an active role in the participants' involvement in the activity. They are belaying, coaching, evaluating, and closely monitoring the participants throughout their use of the activity. An Operator needs to understand the device, how it operates, and what to watch for during its operation. They may not need to understand similar details about participants. A Facilitator needs to understand the course and equipment, and must understand the participants and manage them as well. This requires a greater level of training and awareness than is recognized within the broader F24 standards.

***Rationale: Zip lines are gaining popularity in outdoor recreation & pose a risk of falls***

The rationale points to a journal article from The American Journal of Emergency Medicine. The challenge with this article is that its data does not support its conclusion.

Within the article it states that the research methodology was insufficient to make the following assertions:

1. Popularity and thus usage went up significantly during this time period, but could not be considered as no usage data was available.
2. The data was not able to support the complete elimination of playground incidents. This skews the results when considering application of the data to non-playground use.
3. There was no provision for distinguishing between commercially operated and homemade "backyard" zip lines. Further, schools and camps were never even considered as a category.
4. The study concludes that additional data is needed in order to develop better strategies for specific user categories.

All of these factors make it impossible to draw any accurate conclusions regarding the effect of any specific applied or ignored standards.

The article suggests that accident rates prior to commercialization and popularity of backyard zip lines was fairly low. One could argue that during the time between 1994 and 2008, most camp and school programs (currently exempted programs) ran reasonably safe programs with ACCT Standards in publication and use. According to the post-2008 findings in the article, very young children (under age 10) accounted for almost half of the accidents. This age group is generally outside the population served by camps and schools (currently exempted facilities). The majority of injuries were caused by falls and could have been prevented by the effective use of personal protective equipment such as harnesses. The inclusion of homemade, backyard zip lines and playground structures has skewed the findings significantly. The removal of the exclusions does not increase zip line safety as it does not address any of the underlying relevant causes.



## CONCLUSION/NEXT STEPS

Creating standards to support safer experiences is a goal everyone shares. Persons voting on this ballot are encouraged to consider the various rationales and participate in the voting process. Please vote according to ASTM procedures; a negative vote means providing a comment and contacting the technical contact listed on the ballot to discuss your perspective. Votes must be cast by August 13, 2018.

This current F2959 exclusion is important because unlike amusement rides which have the sole purpose of fun, Aerial Adventure/Challenge Courses have many potential uses. This has a direct impact on how they are designed, staffed, operated and experienced by participants. For regulators and other parties who are considering application of the F24 standards to Aerial Adventure Courses, it is imperative that they understand the scope and types of activities involved. Assessment of whether compliance with F2959 is appropriate, versus compliance with another standard that may be better aligned with intended use, is critical to achieving the common goal of increasing public safety.

Working within the F2959 standard to create better language surrounding what constitutes amusement usage for a given device is critical. In addition, an effort needs to be made to educate owners of challenge courses, and zip lines in particular, regarding these definitions and designations. A knife is a knife, but it has the capacity to be both an effective kitchen tool and a weapon. Variability of design and intended purpose play a role in deciding what category a device falls into.

ACCT supports the efforts of the ASTM International F24 committee to develop resources for commercial Aerial Adventure Courses, and ACCT remains actively engaged in this dialogue. For any interested parties (including ASTM members who are not yet ACCT members), ACCT is planning to write compendium papers as an open, educational resource. You are also welcome to join the process by volunteering within ACCT on standards committees, affinity groups, or one of ACCT's many work groups ([www.acctinfo.org](http://www.acctinfo.org)). Additionally, as an ANSI ASD, it is ACCT's desire to work with other standards writing organizations to harmonize standards where applicable.

ANSI/ACCT 03-2016 standards are currently undergoing a revision. ACCT members have over forty years of history in the Aerial Adventure/Challenge Course industry and more than twenty-four years of standards development experience specific to this industry. Design, performance, and inspection standards are important, and because of the participatory nature of the courses, operating and training standards are equally critical in ensuring public safety. A major upcoming change to the ANSI/ACCT Standards content also includes updated definitions that address participant experience and operating approaches. While there are certain parts of a standard that all courses can and must follow (e.g., having a pre-use inspection), there are aspects of courses that require different standards based on how they are used and their intended outcomes.

**\*\*ASTM F747-15 Standard Terminology Relating to Amusement Rides and Devices:**

*Aerial trekking course—self-guided aerial adventure course containing elements intended to be obstacles.*

*Amusement ride or amusement device—a device or combination of devices or elements that carry, convey, or direct a person(s) over or through a fixed or restricted course or within a defined area, for the primary purpose of amusement or entertainment.*

*Canopy tour—aerial adventure course which provides patron access to the canopy of a forest.*

*Challenge course—guided aerial adventure course containing elements intended to be obstacles.*

*Operator—the person having direct control of the starting, stopping, or speed of an amusement ride.*

**ANSI/ACCT 03-2016 Definitions:**

*Aerial Adventure/Trekking Park - A self-guided challenge course that is supervised and open to the public. Access is controlled*

*Canopy Tour - A guided aerial exploration or transit of the forest canopy, most commonly by means of a series of zip lines or aerial walkways with platforms*

*Challenge Course - A facility or facilities consisting of one or more elements that challenge participants including zip line tours, canopy tours or aerial adventure/trekking parks.*

*Challenge Course Program - An opportunity designed and facilitated to provide participants with an adventure based learning experience that will lead to a desired outcome. The program may include high and low elements along with non-spotted activities*

*Course - Short form for challenge course, zip line tour, canopy tour, or aerial adventure/trekking park.*

*Guide - A staff member trained to assist, accompany, supervise, and provide instructions to participants on a zip line or canopy tour.*

*Operator - The person or entity directly responsible for the operation of an element, course or program.*



# EXHIBIT E



Department of  
**Labor & Workforce  
Development**

Workplace  
Regulations & Compliance

### Compliant Amusement Device Companies with Annual Permits

COMPANY NAME	CITY	STATE	PERMIT
			EXPIRATION DATE
123 BOUNCE PARTY	COOKEVILLE	TN	9/27/2019
60 MINUTE ESCAPE LLC	MURFREESBORO	TN	4/16/2020
7D INTERACTIVE	GATLINBURG	TN	11/6/2019
7D INTERACTIVE, LLC	PIGEON FORGE	TN	11/6/2019
901 PARTIES	MEMPHIS	TN	8/16/2019
A & A PARTY RENTALS	SEVIERVILLE	TN	3/8/2020
A-1 AMUSEMENT MASTERS PRODUCTIONS	TUCKER	GA	8/13/2019
ABOVE ALL EXTREME AIR SPORTS	BRENTWOOD	TN	2/12/2020
ACES COURSE	DYER	TN	6/24/2019
ACTION RENTAL & SALES INC	KINGSPORT	TN	12/20/2019
ACTION RENTAL AND SALES OF CHATTANOOGA, INC.	CHATTANOOGA	TN	9/9/2019
ADRENALINE PARK	KODAK	TN	11/13/2019
ADVENTURE PARK OF SEVIERVILLE	SEVIERVILLE	TN	4/8/2020
ADVENTURE RACEWAY, INC	PIGEON FORGE	TN	3/21/2020
ADVENTUREWORKS, INC.-KINGSTON SPRINGS	KINGSTON SPRINGS	TN	10/4/2019
ADVENTUREWORKS, INC-MUSIC CITY FONTANEL	NASHVILLE	TN	10/4/2019
ADVENTUREWORKS, INC-SEVIERVILLE	SEVIERVILLE	TN	10/4/2019
AFFORDABLE BOUNCE-N-SLIDE RENTALS	MEMPHIS	TN	7/11/2019



COMPANY NAME	CITY	STATE	PERMIT EXPIRATION DATE
AIR BOUNCE LLC PARTY & PLAY CHATTANOOGA	CHATTANOOGA	TN	3/28/2020
AIR BOUNCE LLC PARTY & PLAY CLEVELAND	CLEVELAND	TN	3/28/2020
AIR BOUNCE LLC PARTY & PLAY MARYVILLE	ALCOA	TN	3/28/2020
ALL AIR EXTREME, LLC	HENDERSONVILLE	TN	4/4/2020
ALL BOUNCE EVENTS	POWELL	TN	8/10/2019
ALL OCCASIONS PARTY RENTALS	KNOXVILLE	TN	3/4/2020
ALL STAR AMUSEMENTS, LLC	FARMLAND	IN	5/3/2019
ALTITUDE TRAMPOLINE PARK	HERMITAGE	TN	4/2/2020
AMUSEMENT ATTRACTIONS, INC.	RIVERVIEW	FL	8/17/2019
AMUSEMENT GAMES OF AMERICA	RIVERVIEW	FL	5/21/2020
ANAKEESTA, LLC	GATLINBURG	TN	8/17/2019
ANDERSON RENTAL CO. INC.	ALCOA	TN	2/21/2020
APEX INFLATABLES, LLC	FT. OGLETHORPE	GA	8/27/2019
APPALACHIAN CHRISTIAN CAMP	UNICOI	TN	6/12/2019
ARNOLD AMUSEMENTS INC.	TRAVERSE CITY	MI	9/5/2019
ART PANCAKE'S PARTY AND WEDDING RENTALS	NASHVILLE	TN	6/14/2019
ASTRO JUMP OF CHATTANOOGA	CHATTANOOGA	TN	10/22/2019
ASTRO JUMP OF KNOXVILLE	KNOXVILLE	TN	2/25/2020
ATHENS PARTY RENTALS, LLC	ATHENS	TN	11/13/2019
ATOKA ESCAPE GAMES LLC	ATOKA	TN	3/22/2020
ATOKA'S RAILROAD ADVENTURE PLUS LLC	ATOKA	TN	10/2/2019
B&K CARNIVAL	GRESHAM	SC	7/12/2019

COMPANY NAME	CITY	STATE	PERMIT
			EXPIRATION DATE
BACKYARD BOUNCE LLC	HENDERSONVILLE	TN	4/4/2020
BACKYARD BOUNCERS	ROCKY TOP	TN	9/12/2019
BACKYARD BOUNCERS OF MEDINA	MEDINA	TN	10/6/2019
BAILEYTON KOA	GREENEVILLE	TN	3/27/2020
BALL FARM EVENT CENTER	LAFOLLETTE	TN	4/25/2020
BALLINGER FARM CRAZY MAZE	JEFFERSON CITY	TN	11/21/2019
BAYS MOUNTAIN PARK	KINGSPORT	TN	7/4/2019
BB'S BOUNCERS	MADISONVILLE	TN	7/24/2019
BEAM'N INFLATABLES	GREENEVILLE	TN	4/18/2019
BEAR COUNTRY ADVENTURE FUN PARK LLC	PIGEON FORGE	TN	9/24/2019
BELLE CITY AMUSEMENTS INC.	DELTONA	FL	8/28/2019
BENTON BOUNCE	OLD FORT	TN	11/20/2019
BIG FOOT ADVENTURES	TRACY CITY	TN	3/13/2020
BIG ROCK AMUSEMENTS, LLC	FRANKEMUTH	MI	3/22/2020
BIG ROUND WHEEL AMUSEMENTS	COOKEVILLE	TN	12/13/2019
BLAKE JONES RACING CENTER	PIGEON FORGE	TN	11/7/2019
BLINDSHOT BARNABY'S	GATLINBURG	TN	6/27/2019
BLUEGRASS RIDES	LAWRENCEBURG	KY	12/5/2019
BLUEWATERS EQUIPMENT RENTAL	COOKEVILLE	TN	7/8/2019
BLUFF CITY ESCAPE ROOMS	BARTLETT	TN	9/20/2019
BORO BOUNCE AND PARTY RENTALS	MURFREESBORO	TN	11/14/2019
BOUNCE BIG PARTY RENTALS	FAYETTEVILLE	TN	4/4/2019



COMPANY NAME	CITY	STATE	PERMIT
			EXPIRATION DATE
BOUNCE BROTHERS RENTALS	MT. JULIET	TN	11/13/2019
BOUNCE CITY MEMPHIS	MEMPHIS	TN	9/30/2019
BOUNCE IT OFF INFLATABLES	GOODLETTSVILLE	TN	7/8/2019
BOUNCE N FUN EVENTS RENTAL, LLC	MEMPHIS	TN	7/28/2019
BOUNCE OUT PARTY RENTALS	DRUMMOND	TN	4/16/2019
BOUNCE U - MURFREESBORO	MURFREESBORO	TN	4/11/2020
BOUNCES BY BARNES EVENTS & PARTY RENTALS	CORDOVA	TN	8/27/2019
BOUNCING UP FUN	CROSSVILLE	TN	11/21/2019
BOUNCY BOUNCE LLC	CLARKSVILLE	TN	2/14/2020
BOUNDS OF FUN, LLC	TULLAHOMA	TN	4/16/2020
BRADY'S AMUSEMENTS	VALDOSTA	GA	10/31/2019
BREAKOUT GAMES-NASHVILLE	FRANKLIN	TN	11/1/2019
BREAKOUT MEMPHIS	BARLETT	TN	6/26/2019
BRIDGES USA INC.	MEMPHIS	TN	4/4/2020
BURGESS AMUSEMENTS	COVINGTON	GA	9/14/2019
BYRD'S FUNTIME RENTAL	HUNTSVILLE	TN	1/3/2019
C & R RAILROAD	MURFREESBORO	TN	9/22/2019
C&M AMUSEMENTS, INC.	PIGEON FORGE	TN	7/11/2019
CADAS	CHATTANOOGA	TN	11/13/2019
CAMP BUCK TOMS	KNOXVILLE	TN	6/16/2019
CAMP DAVY CROCKETT	WHITESBURG	TN	6/15/2020
CAMP GARNER CREEK RETREAT CENTER	DICKSON	TN	3/6/2020

COMPANY NAME	CITY	STATE	PERMIT
			EXPIRATION DATE
CAMP HOLLOWAY	MILLERSVILLE	TN	7/28/2019
CAMP HOPE OF EAST TN	ROGERSVILLE	TN	5/7/2019
CAMP LIVING STONES, INC.	ENGLEWOOD	TN	5/16/2020
CAMP MACK MORRIS	CAMDEN	TN	5/31/2019
CAMP NAKANAWA, INC	CROSSVILLE	TN	11/13/2019
CAMP RIVERSLANDING	PIGEON FORGE	TN	10/23/2019
CAMP SYCAMORE HILLS	ASHLAND CITY	TN	7/28/2019
CAMP TA - PA - WIN - GO	WATAUGA	TN	4/4/2020
CAMP WESLEY WOODS	TOWNSEND	TN	11/7/2019
CAMP YI	LAVERGNE	TN	8/17/2019
CAMPBELL PARTY RENTALS	ALCOA	TN	6/8/2019
CANOPY CHALLENGE COURSE	SPENCER	TN	4/13/2020
CASEY'S RIDES	UTICA	KY	5/7/2019
CEDAR CREST CAMP	LYLES	TN	6/6/2019
CEDAR LAKE CAMP	LIVINGSTON	TN	4/22/2020
CHEERVILLE - HENDERSONVILLE	HENDERSONVILLE	TN	2/25/2020
CHEERVILLE - MT JULIET	MT JULIET	TN	2/25/2020
CHIEF RENTAL INC.	NASHVILLE	TN	3/27/2020
CHIP - A - ROOS LLC	SELMER	TN	10/1/2019
CHUCKLES	CROSSVILLE	TN	2/22/2020
CLABOUGH'S CAMPGROUND	PIGEON FORGE	TN	11/15/2019
CLIMB WORKS LLC	GATLINGURG	TN	3/8/2020



COMPANY NAME	CITY	STATE	PERMIT EXPIRATION DATE
COMET BOUNCE INC.	CLEVELAND	TN	10/5/2019
COMPASS ROSE EVENTS, INC.	BOOTHBAY	ME	5/24/2019
CONCESSIONS BY CRISTIANI INC	SARASOTA	FL	8/8/2019
COOKEVILLE ESCAPE	COOKEVILLE	TN	2/26/2020
CORDOVA URBAN AIR LLC	CORDOVA	TN	6/8/2019
CORNERSTONE OF RECOVERY	LOUISVILLE	TN	9/26/2019
COVENANT RANCH, INC	BUCHANAN	TN	8/7/2019
COVERT ESCAPE GAMES	CLARKSVILLE	TN	1/14/2020
CROSSNET BAPTIST NETWORK	CLEVELAND	TN	1/8/2020
CUMBERLAND HEIGHTS	NASHVILLE	TN	11/9/2019
CUMBERLAND YOUTH CAMP	WOODLAWN	TN	6/19/2019
D & H RAILROAD LLC	MT JULIET	TN	9/14/2019
D&D INFLATABLES	ASHLAND CITY	TN	5/7/2019
DAVIS FAMILY'S LITTLE HOUSE OF HOPPERS	LAWRENCEBURG	TN	3/25/2020
DEER RUN CAMPS AND RETREATS	THOMPSON STATION	TN	3/6/2020
DISCOVERY PARK OF AMERICA, INC	UNION CITY	TN	5/7/2019
DJ'S PARTY RENTALS, LLC	COLUMBIA	TN	11/7/2019
DOE RIVER GORGE MINISTRIES INC.	HAMPTON	TN	3/11/2020
DOLLYWOOD	PIGEON FORGE	TN	3/28/2020
DONNELL CENTURY FARM ADVENTURE	JACKSON	TN	11/15/2019
DREAMLAND AMUSEMENTS, INC.	LAKE TAHOE	NV	9/7/2019
DREW EXPOSITION	AUGUSTA	GA	5/30/2019

COMPANY NAME	CITY	STATE	PERMIT
			EXPIRATION DATE
EAGLE ROCK CAMP	TALLASSEE	TN	6/3/2020
EAGLE'S QUEST CHALLENGE COURSE	GREENEVILLE	TN	5/11/2019
EARTHQUAKE THE RIDE	GATLINBURG	TN	5/23/2019
EAST TENNESSEE INFLATABLES PARTY RENTALS	GRAY	TN	3/15/2019
EAST TENNESSEE STATE UNIVERSITY CAMPUS RECREATION	JOHNSON CITY	TN	5/7/2020
ECHO VALLEY CORN MAZE	JEFFERSON CITY	TN	11/15/2019
ELIZABETHTON ESCAPE	ELIZABETHTON	TN	8/2/2019
ESCAPE GAME 101	JONESBOROUGH	TN	7/18/2019
ESCAPE GAME KNOXVILLE	KNOXVILLE	TN	11/27/2019
ESCAPE ROOM KINGSPORT	KINGSPORT	TN	2/13/2020
ESCAPE THE LINE	COPPERHILL	TN	2/19/2020
ESCAPEWORKS, LLC	KNOXVILLE	TN	10/24/2019
ESCAPOLOGY MASTERS	BARTLETT	TN	9/27/2019
EVENT RENTALS BY ROTHCHILD	KNOXVILLE	TN	1/11/2020
EXCAPE GAMES CLARKSVILLE LLC	CLARKSVILLE	TN	11/29/2019
EXTREME ESCAPE GAMES	FRANKLIN	TN	10/22/2019
EXTREME THRILLS	JACKSON	TN	6/27/2019
FAIRVIEW PARTY RENTALS, LLC	FAIRVIEW	TN	4/18/2020
FAST TRACKS	PIGEON FORGE	TN	11/21/2019
FENDERS FARM MAZE	JONESBOROUGH	TN	7/17/2019
FINELINE CONCESSIONS	WARNER ROBINS	GA	7/12/2019
FLIP FEST GYMNASTICS CAMP & LAKE FRANCES RETREAT	CROSSVILLE	TN	5/29/2019



COMPANY NAME	CITY	STATE	PERMIT
			EXPIRATION DATE
FLORENCE CRITTENTON AGENCY	KNOXVILLE	TN	3/6/2019
FLY AWAY INDOOR SKYDIVING	PIGEON FORGE	TN	1/14/2020
FOOTHILLS CAMP & RETREAT CENTER	LOUISVILLE	TN	1/28/2020
FOR THE KINGDOM, INC	MEMPHIS	TN	4/18/2020
FOREVER YOUNG AMUSEMENTS	CONLEY	GA	4/20/2019
FOX CREEK AMUSEMENT COMPANY	LEXINGTON	KY	6/21/2019
FOXFIRE MOUNTAIN ADVENTURE PARK	SEVIERVILLE	TN	9/26/2019
FREEMAN HOLLOW AMUSEMENTS	GOODLETTSVILLE	TN	6/28/2019
FUN FACTORY	FAYETTEVILLE	WV	6/21/2019
FUN FOR ALL PARTY RENTALS	KINGSPORT	TN	3/25/2020
FUN STOP FAMILY ACTION PARK LLC	PIGEON FORGE	TN	6/12/2019
FUN ZONE AMUSEMENTS INC	THREEWAY	TN	9/22/2019
FUNTIME OUTFITTERS, INC.	ARLINGTON	TN	4/2/2020
FUNTOPIA	DYERSBURG	TN	12/14/2019
GATLINBURG MTN COASTER	GATLINBURG	TN	7/26/2019
GATLIN'S	GATLINBURG	TN	6/15/2019
GAYLORD OPRYLAND RESORT	NASHVILLE	TN	12/12/2019
GET AIR MEMPHIS LLC	COLLIERVILLE	TN	4/22/2020
GLOW GALAXY	FRANKLIN	TN	11/29/2019
GO APE SHELBY FARMS PARK, LLC	MEMPHIS	TN	3/14/2020
GOLD STAR AMUSEMENTS	MARRERO	LA	5/11/2019
GOLF AND GAMES FAMILY PARK, INC.	MEMPHIS	TN	11/14/2019

COMPANY NAME	CITY	STATE	PERMIT
			EXPIRATION DATE
GRAND RENTAL STATION	GREENEVILLE	TN	9/22/2019
GRAND SLAM INFLATABLES	HAMPTON	TN	10/24/2019
GREENE COUNTY FAIR, INC	GRENNEVILLE	TN	1/10/2020
GREENWOOD CHALLENGE ROPES COURSE	JOHNSON CITY	TN	4/8/2020
GUANGZHOU FUN CITY	DUNNELLON	FL	8/17/2019
HAMBONES ENTERTAINMENTS LLC	MENDOTA	VA	4/23/2020
HAPPY ADVENTURES, LLC	LAWRENCEBURG	TN	1/17/2020
HAPPY WORLD	CEDAR PARK	TX	9/1/2019
HARMONY FAMILY CENTER	MARYVILLE	TN	4/25/2020
HARVEST PARTY RENTALS	SEYMOUR	TN	4/25/2019
HAYES BOUNCE HOUSE	SPARTA	TN	8/4/2019
HEADCASE LLC	GATLINBURG	TN	8/6/2019
HENDERSONVILLE STRIKE & SPARE	HENDERSONVILLE	TN	11/5/2019
HERMITAGE STRIKE & SPARE	HERMITAGE	TN	11/5/2019
HICKORY RIDGE MALL C.D. CORP	MEMPHIS	TN	1/14/2020
HILLBILLY GOLF, INC.	GATLINBURG	TN	9/26/2019
HOLDER FAMILY FUN CENTER	HENDERSONVILLE	TN	10/31/2019
HOLLYWOOD WAX MUSEUM ENTERTAINMENT CENTER	PIGEON FORGE	TN	4/22/2020
HONEYSUCKLE HILL FARM LLC.	SPRINGFIELD	TN	6/20/2019
HOPPITY HOP INFLATABLES LLC	HENDERSONVILLE	TN	7/26/2019
HORTON HAVEN CHRISTIAN CAMP	LEWISBURG	TN	5/8/2020
HUMPTY JUMPTY INFLATABLES, LLC	HARTSVILLE	TN	6/12/2019



COMPANY NAME	CITY	STATE	PERMIT
			EXPIRATION DATE
I ESCAPED MEMPHIS	MEMPHIS	TN	6/26/2019
IBOUNCE RENTALS L.L.C.	OLIVE BRANCH	MS	3/6/2020
ICON AMUSEMENTS LLC	GREENVILLE	AL	3/31/2019
INCREDIBLE PIZZA COMPANY, LLC	CORDOVA	TN	1/2/2020
INDIAN CREEK CAMP	LIBERTY	TN	3/13/2020
INFLATE A FUN	ATOKA	TN	7/17/2019
INFLATE-A-WORLD	HOHENWALD	TN	3/22/2020
INFUSION INFLATABLES, INC	MILLINGTON	TN	3/10/2020
INTERSTATE AMUSEMENTS	NEW SMYRNA BEACH	FL	8/17/2019
ISLAND CAROUSEL, INC	MARCO ISLAND	FL	11/17/2019
ISLAND MIRROR MAZE	PIGEON FORGE	TN	6/13/2019
IT'S TIME 2 BOUNCE	FAIRVIEW	TN	3/8/2020
J&J GLOBAL INVESTMENTS/SMOKY MOUNTAIN ALPINE COAST	PIGEON FORGE	TN	9/12/2019
J&J ROBERT CORP dba NORTHSTAR EVENT RENTALS	GOODLETTSVILLE	TN	4/10/2020
JACKSON BOWLING FAMILY FUN CENTER LLC	JACKSON	TN	7/27/2019
JACKSON ESCAPE ROOMS	JACKSON	TN	7/25/2019
JAMES GANG AMUSEMENT LLC	ANDALUSIA	AL	4/23/2020
JAYELL RANCH	SEVIERVILLE	TN	9/28/2019
JCJ AMUSEMENTS	GIBSONTON	FL	7/31/2019
JEST ENTERTAINMENT	MURFREESBORO	TN	10/11/2019
JOHN KNOX CENTER	TEN MILE	TN	6/29/2019
JOHNSON'S RIDE & CONCESSIONS	ELDORADO	AR	7/11/2019

COMPANY NAME	CITY	STATE	PERMIT
			EXPIRATION DATE
JOURNEYPURE	MURFREESBORO	TN	1/24/2019
JUMP DAY INFLATABLES	HENDERSONVILLE	TN	7/5/2019
JUMP FOR JOY	MARTIN	TN	6/22/2019
JUMP JAM TRAMPOLINE PARK	KNOXVILLE	TN	9/29/2019
JUMP JUMP BOUNCE	MURFREESBORO	TN	11/19/2019
JUMPIN JANE'S LLC	LEOMA	TN	2/5/2020
JUMPIN JAX INFLATABLES AND PARTY RENTALS	MURFREESBORO	TN	4/5/2020
JUMPIN JELLYBEANS	COLLIERVILLE	TN	3/12/2019
JUMPIN' JUNCTION	CLEVELAND	TN	9/12/2019
JUMPING HEARTS PARTY RENTAL	LAVERGNE	TN	2/20/2020
JUMPING JACKS INFLATABLES LLC	LAFAYETTE	TN	5/24/2019
JUMPING WORLD, LLC	MEMPHIS	TN	4/22/2019
JUMPS-N-GIGGLES	LAWRENCEBURG	TN	3/13/2020
JUMPSTREET 14 INC.	FRANKLIN	TN	7/5/2019
JUMPSTREET 15 INC.	GOODLETTSVILLE	TN	7/5/2019
JUMPSTREET 16 INC	MURFREESBORO	TN	7/5/2019
JUMPY THINGS LLC	CLEVELAND	TN	6/25/2019
JURASSIC JUNGLE BOAT RIDE	PIGEON FORGE	TN	5/23/2019
JURASSIC QUEST	SPRING	TX	3/8/2020
JUST JUMP - BRISTOL	BRISTOL	TN	3/14/2020
JUST JUMP TRAMPOLINE PARK - JOHNSON CITY	JOHNSON CITY	TN	3/14/2020
K&M BOUNCE	MEMPHIS	TN	6/29/2019



COMPANY NAME	CITY	STATE	PERMIT
			EXPIRATION DATE
KANAKUK MINISTRIES	BRANSON	MO	4/23/2019
KELLER'S CORNY COUNTRY	DICKSON	TN	10/15/2019
KIDS PLACE INC.	MASCOT	TN	4/25/2020
KIDS WORLD PRODUCTION LLC	ARLINGTON	TN	8/30/2019
KIDZ KOUNTRY PETTING ZOO	SOUTHAVEN	MS	9/27/2019
KINGSPORT CAROUSEL	KINGSPORT	TN	7/8/2019
KINGSPORT/BRISTOL KOA	BLOUNTVILLE	TN	5/24/2019
KISSEL ENTERTAINMENT, LLC	CLANTON	AL	4/22/2020
KRYPTOLOGY ESCAPE ROOM, LLC	PIGEON FORGE	TN	10/7/2019
KYKER FARMS	SEVIERVILLE	TN	10/5/2019
LASER QUEST	KNOXVILLE	TN	11/26/2019
LAUGHS A LOT INFLATABLES	HOHENWALD	TN	4/9/2019
LAZER TAG KNOXVILLE, L.P.	KNOXVILLE	TN	3/14/2019
LEAPS N BOUNCE, LLC	SWEETWATER	TN	7/20/2019
LEGACY MOUNTAIN ZIPLINES, LLC	SEVIERVILLE	TN	4/4/2020
LET'S BOUNCE RENTALS, LLC	ANTIOCH	TN	2/8/2020
LIFETIME FITNESS	COLLIERVILLE	TN	12/21/2019
LIFETIME FITNESS	FRANKLIN	TN	12/21/2019
LIFT WELLNESS CENTER	JACKSON	TN	6/7/2019
LINDEN VALLEY BAPTIST CONFERENCE CENTER	LINDEN	TN	7/4/2019
LITTLE BOUNCE	ANTIOCH	TN	7/23/2019
LITTLE CRITTERS	WATERTOWN	TN	5/9/2019

COMPANY NAME	CITY	STATE	PERMIT
			EXPIRATION DATE
LITTLE PETE'S RAILROAD	SEVIERVILLE	TN	8/30/2019
LOCKED GAMES	MURFREESBORO	TN	4/18/2020
LOCO-MOTIVES	MEMPHIS	TN	3/16/2019
LONE STAR ENTERTAINMENT, LLC	ELIZABETHTON	TN	11/8/2019
LONG HUNTER STATE PARK	HERMITAGE	TN	10/10/2019
LOWERY CARNIVAL CO	MONTEGUT	LA	6/14/2019
LTA DEPOT, LLC	MURFREESBORO	TN	1/25/2020
LUCKY LADD FARMS, INC	EAGLEVILLE	TN	3/20/2020
LUMBER JACK FEUD	PIGEON FORGE	TN	12/19/2019
LYON FAMILY FARMS LLC	TAFT	TN	11/1/2019
MADDIE B'S BOUNCE HOUSE	MORRISTOWN	TN	1/2/2020
MADJAX AMUSEMENTS/MIDWEST RIDES	ELK RIVER	MN	8/31/2019
MAGICAL MINKS ENTERTAINMENT	UNION CITY	TN	7/15/2019
MAGIQUEST	PIGEON FORGE	TN	6/25/2019
MAIN EVENT ENTERTAINMENT, LP	KNOXVILLE	TN	7/26/2019
MAIN EVENT ENTERTAINMENT, LP-MEMPHIS	MEMPHIS	TN	4/12/2020
MANCHESTER KOA	MANCHESTER	TN	5/11/2019
MANDERLEY CHRISTIAN CAMP & CONFERENCE CENTER	PIKEVILLE	TN	9/20/2019
MARYVILLE COLLEGE	MARYVILLE	TN	5/24/2019
MASTER OF CEREMONIES, INC.	TULLAHOMA	TN	4/17/2020
MAX AIR TRAMPOLINE PARK	POWELL	TN	11/19/2019
MAYFIELD FARM & NURSERY, LLC	ATHENS	TN	10/22/2019



COMPANY NAME	CITY	STATE	PERMIT EXPIRATION DATE
MEMPHIS ESCAPE ROOM - JUNE ROAD	MEMPHIS	TN	6/7/2019
MEMPHIS ESCAPE ROOM - SOUTH MAIN	MEMPHIS	TN	6/7/2019
MEMPHIS ZOOLOGICAL SOCIETY	MEMPHIS	TN	10/4/2019
MENNY'S JUMPERS	FRANKLIN	TN	5/31/2019
MH BOUNCING	MEMPHIS	TN	4/23/2020
MIA'S BRINCOLINES	ANTIOCH	TN	6/21/2019
MIDDLE TENNESSEE BOUNCE	CASTILLIAN SPRINGS	TN	5/16/2019
MIDDLE TN COUNCIL -- BOXWELL RESERVATION	LEBANON	TN	12/6/2019
MID-SOUTH SKY HIGH BOUNCERS	BARTLETT	TN	9/14/2019
MILAN ELEMENTARY SCHOOL	MILAN	TN	10/25/2019
MITCHELL BROTHERS AMUSEMENTS	SLIDELL	LA	8/29/2019
MONKEY BUSINESS LLC	MADISONVILLE	TN	7/19/2019
MONKEY JOE'S	MADISON	TN	11/14/2019
MONTGOMERY BELL ACADEMY--LONG MOUNTAIN ACADEMY	NASHVILLE	TN	9/7/2019
MOONWALKS AND MORE	COLUMBIA	TN	5/30/2019
MOUNTAIN T.O.P. INC	ALTAMONT	TN	5/18/2019
MR GAMES MOBILE PARTY & ENTERTAINMENT, LLC	MEMPHIS	TN	7/11/2019
MR. GATTI'S PIZZA	KNOXVILLE	TN	11/19/2019
MURFREESBORO ESCAPE ROOM	MURFREESBORO	TN	4/16/2020
MUSIC CITY ESCAPE	NASHVILLE	TN	3/18/2020
MYSTERIOUS MANSION	GATLINGURG	TN	1/22/2020
N.A.M.E. - AMUSEMENT SOUTH	BYRAM	MS	9/7/2019

COMPANY NAME	CITY	STATE	PERMIT EXPIRATION DATE
NACOME CAMP & CONFERENCE CENTER	PLEASANTVILLE	TN	3/14/2020
NANO SOLUTIONS	KNOXVILLE	TN	11/21/2019
NASHVILLE ADVENTURE PARK	NASHVILLE	TN	6/5/2019
NASHVILLE JELLYSTONE PARK/MUSIC CITY CAMPING	NASHVILLE	TN	7/26/2019
NASHVILLE SHORES	HERMITAGE	TN	10/15/2019
NASHVILLE SOUNDS BASEBALL	NASHVILLE	TN	5/11/2019
NASHVILLE URBAN AIR, LLC	OLD HICKORY	TN	12/11/2019
NASHVILLE ZOO INC	NASHVILLE	TN	10/12/2019
NAVITAT CANOPY ADVENTURES	KNOXVILLE	TN	6/22/2019
NEW FRONTIERS	DOWELLTOWN	TN	1/25/2020
NEXT TO HEAVEN	TOWNSEND	TN	11/9/2019
NORTH NASH EVENT RENTALS	WHITE HOUSE	TN	11/2/2019
OAKES FARM, LLC	CORRYTON	TN	9/14/2019
OBER GATLINBURG, INC	GATLINBURG	TN	6/7/2019
OCOEE RIDGE CAMP LLC	OLD FORT	TN	2/20/2020
OCOEE RIVER BASIN CANOPY TOURS	DUCKTOWN	TN	3/7/2020
OCOEE ZIPZ, INC	BENTON	TN	2/25/2020
OFF THE GRID MOUNTAIN ADVENTURES, LLC	BRISTOL	TN	4/9/2020
ONSITE WORKSHOPS	CUMBERLAND FURANCE	TN	7/17/2019
PALMETTO AMUSEMENTS.	LEXINGTON	SC	8/2/2019
PARADISE AMUSEMENTS, INC.	OCALA	FL	8/30/2019
PARC PIGEON FORGE, LLC / NASCAR SPEEDPARK	SEVIERVILLE	TN	3/20/2020



COMPANY NAME	CITY	STATE	PERMIT EXPIRATION DATE
PARKRIDGE VALLEY HOSPITAL	CHATTANOOGA	TN	9/20/2019
PARTY BOUNCE RENTALS	ROGERSVILLE	TN	8/13/2019
PARTY SOURCE & RENTALS LLC	COOKEVILLE	TN	2/12/2020
PARTY STATION RENTALS d/b/a PSR RENTALS	CLARKSVILLE	TN	4/1/2020
PARTY TIME RENTALS	CLEVELAND	TN	7/10/2019
PBJ HAPPEE DAY SHOWS INC.	MARION	AR	8/30/2019
PERFECT PARTY RENTALS	CROSSVILLE	TN	7/23/2019
PERPLEXODUS ESCAPES	JOHNSON CITY	TN	8/30/2019
PHILLIPS RENTALS LLC	COOKEVILLE	TN	11/15/2019
PIGEON FORGE/GATLINGURG KOA	PIGEON FORGE	TN	7/8/2019
PIGEON RIVER CANOPY TOURS	HARTFORD	TN	3/7/2020
PIN STRIKES FAMILY ENTERTAINMENT	CHATTANOOGA	TN	7/1/2019
PINE COVE IN THE CITY (2)	COLUMBUS	TX	5/30/2019
PINE COVE INC. (1)	WESTMINSTER	SC	6/1/2019
PLANET 3 EXTREME AIR PARK	CLARKSVILLE	TN	10/1/2019
PLAYTIME SPORTS GAMES LLC	SMYRNA	TN	4/27/2020
PLEASANT VIEW PARTY RENTALS	ASHLAND CITY	TN	7/6/2019
POPE'S AMUSEMENT RIDES LLC	GREENFIELD	TN	1/19/2020
PRIME TIME AMUSEMENTS, LLC	VALRICO	FL	7/20/2019
PROSPECT BAPTIST CHURCH	FAYETTEVILLE	TN	5/16/2019
PULSEWORKS, LLC	CHATTANOOGA	TN	11/8/2019
PUMP IT UP - BARTLETT	BARTLETT	TN	9/30/2019

COMPANY NAME	CITY	STATE	PERMIT
			EXPIRATION DATE
PUMP IT UP - KNOXVILLE	KNOXVILLE	TN	10/16/2019
PUMP IT UP OF BRENTWOOD	BRENTWOOD	TN	1/24/2020
PUMP IT UP OF MT JULIET	MT JULIET	TN	1/24/2020
QUANTUM LEAP TRAMPOLINE SPORTS ARENA	JOHNSON CITY	TN	6/19/2019
RAFT 1 CO.	COPPERHILL	TN	6/21/2019
READY STEADY JUMP	THOMPSONS STATION	TN	5/25/2019
REED EXPOSITION LLC	BAYTOWN	TX	8/31/2019
REITHOFFER SHOWS, INC	GIBSONTON	FL	8/17/2019
RELIABLE RENTAL OF FRANKLIN COUNTY	WINCHESTER	TN	3/20/2019
RIPLEY'S AQUARIUM OF THE SMOKIES	GATLINBURG	TN	4/13/2020
RIPLEY'S HAUNTED ADVENTURE	GATLINBURG	TN	5/4/2020
RIPLEY'S MARVELOUS MIRROR MAZE	GATLINBURG	TN	5/4/2020
RIPLEY'S MOVING THEATER	GATLINBURG	TN	5/4/2020
RITS LLC.	HARTFORD	TN	5/25/2019
RIVERVIEW FAMILY FARM LLC	KNOXVILLE	TN	4/16/2020
ROCKIN' L RENTALS, INC.	KINGSTON	TN	7/18/2019
ROCKY TOP MOUNTAIN COASTER	PIGEON FORGE	TN	11/19/2019
ROWDY BEAR MOUNTAIN	SEYMOUR	TN	5/24/2019
RUBY FALLS HIGH POINT ZIP ADVENTURE	CHATTANOOGA	TN	3/1/2020
RUNNING WILD INFLATABLES, LLC	HIXON	TN	7/24/2019
SANTI PARTY RENTAL, LLC	BURNS	TN	5/5/2019
SBS GOLF LLC dba LOST TREASURE GOLF	PIGEON FORGE	TN	3/20/2020



COMPANY NAME	CITY	STATE	PERMIT
			EXPIRATION DATE
SEGA GYMNASTICS	COLLIERVILLE	TN	2/13/2020
SERVICE RENTALS	PARIS	TN	11/21/2019
SEVIER AIR TRAMPOLINE & NINJA WARRIOR PARK	SEVIERVILLE	TN	11/2/2019
SHELF SERVICE BOUNCERS LLC	CHATTANOOGA	TN	8/23/2019
SHOOT EM' UP CINEMA	GATLINBURG	TN	6/27/2019
SIGNAL MOUNTAIN CAMP	CHATTANOOGA	TN	6/1/2019
SIR GOONY GOLF OF CHATTANOOGA INC.	CHATTANOOGA	TN	10/2/2019
SKY HIGH SPORTS--NASHVILLE	NASHVILLE	TN	10/2/2019
SKY ZONE - JACKSON	JACKSON	TN	5/7/2019
SKY ZONE - MEMPHIS	MEMPHIS	TN	5/16/2019
SKYMONT SCOUT RESERVATION	ALTAMONT	TN	7/6/2019
SKYZONE FRANKLIN	FRANKLIN	TN	5/16/2019
SMITH'S INFLATABLES	LAWRENCEBURG	TN	4/3/2020
SMOKY MOUNTAIN ESCAPE GAMES	PIGEON FORGE	TN	10/22/2019
SMOKY MOUNTAIN OBSERVATION WHEEL INVESTORS	PIGEON FORGE	TN	10/20/2019
SMOKY MOUNTAIN ZIP LINES LLC	PIGEON FORGE	TN	5/19/2019
SOAR ADVENTURE TOWER LLC	FRANKLIN	TN	8/22/2019
SONSHINE AMUSEMENTS, INC.	ODENVILLE	AL	8/31/2019
SOUTHERNFIED INFLATABLES	RUTHERFORD	TN	3/9/2019
SPACE WALK OF CLARKSVILLE	CLARKSVILLE	TN	11/29/2019
SPACE WALK OF MARSHALL COUNTY	CULLEOKA	TN	10/11/2019
SPACE WALK OF MARTIN	MARTIN	TN	5/31/2019

COMPANY NAME	CITY	STATE	PERMIT
			EXPIRATION DATE
SPACE WALK OF TIPTON COUNTY	ATOKA	TN	7/17/2019
SPACEWALK OF CLARKSVILLE	CLARKSVILLE	TN	12/22/2018
SPACEWALK OF GERMANTOWN	COLLIERVILLE	TN	8/24/2019
SPACEWALK OF MORRISTOWN	MORRISTOWN	TN	8/27/2019
SPACEWALK OF THE TRI-CITIES	JOHNSON CITY	TN	4/16/2020
ST. COLUMBA ESPISCOPAL CHURCH d/b/a ST COLUMBA EPI	MEMPHIS	TN	3/19/2020
STARKEY ENTERPRISES	RIVERVIEW	FL	9/5/2019
STARS AND STRIKES	SMYNRA	TN	2/7/2020
STOP AND GRAB ENTERTAINMENT	GERMANTOWN	TN	4/5/2020
SUPERFLY TRAMPOLINE PARK	CHATTANOOGA	TN	4/1/2020
TATE'S DAY CAMP	KNOXVILLE	TN	4/25/2020
TENNESSEE BOUNCE PARTIES, LLC	LAVERGNE	TN	10/24/2019
TENNESSEE SMOKIES	KODAK	TN	5/7/2019
THE ADVENTURE GUILD (TAG)	CHATTANOOGA	TN	5/11/2019
THE ADVENTURE GUILD @ CAMP JORDAN	DUNLAP	TN	8/28/2019
THE ART OF ESCAPE	JOHNSON CITY	TN	8/27/2019
THE BIG BOUNCE AMERICA	CHARLOTTE	NC	4/27/2019
THE CAPTURED	GATLINBURG	TN	8/6/2019
THE CHILDREN'S MUSEUM OF MEMPHIS	MEMPHIS	TN	11/22/2019
THE COASTER - GOATS ON THE ROOF	PIGEON FORGE	TN	1/24/2020
THE ENIGMA CHAMBERS	JOHNSON CITY	TN	7/17/2019
THE ESCAPE GAME BERRY HILL, LLC	NASHVILLE	TN	5/21/2019



COMPANY NAME	CITY	STATE	PERMIT EXPIRATION DATE
THE ESCAPE GAME NASHVILLE, LLC	NASHVILLE	TN	5/21/2019
THE ESCAPE GAME PIGEON FORGE, LLC	NASHVILLE	TN	5/21/2019
THE FUN FACTORY	COOKEVILLE	TN	3/6/2019
THE GROVE AT RED OAK LAKE, INC.	CORDOVA	TN	9/28/2019
THE OAKS CAMP & RETREAT CENTER LLC	GREENEVILLE	TN	6/20/2019
THE STUNT JUMP	PROVO	UT	2/7/2020
THE TRACK	PIGEON FORGE	TN	4/12/2020
THE UNIVERSITY OF TN-CLYDE YORK 4-H CENTER	CROSSVILLE	TN	5/15/2019
THE WEBB SCHOOL	BELL BUCKLE	TN	8/23/2019
THIS AND THAT, HERE AND THERE	SPRINGFIELD	TN	10/26/2019
TIKY JUMPS INFLATABLES LLC	MEMPHIS	TN	5/1/2020
TN BOUNCE HOUSE, LLC	COLUMBIA	TN	9/20/2019
TN EVENT SPECIALIST LLC	MURFREESBORO	TN	5/7/2019
TN. PICNIC & PARTY	SMYRNA	TN	8/17/2019
TOLLEY INDUSTRIES, LLC	LYNNVILLE	TN	4/18/2020
TOMB EGYPTIAN ADVENTURE	SEYMOUR	TN	7/25/2019
TOP JUMP LLC	PIGEON FORGE	TN	3/22/2020
TOPSCAN	LEBANON	TN	8/29/2019
TRAPPED ESCAPE GAME	PIGEON FORGE	TN	1/28/2020
TRI-CITIES ESCAPE GAME	BRISTOL	TN	2/15/2020
TRY & ESCAPE TENNESSEE, LLC	GREENBRIER	TN	1/25/2020
TUMBLE ZONE INFLATABLES LLC	OAKLAND	TN	3/8/2020

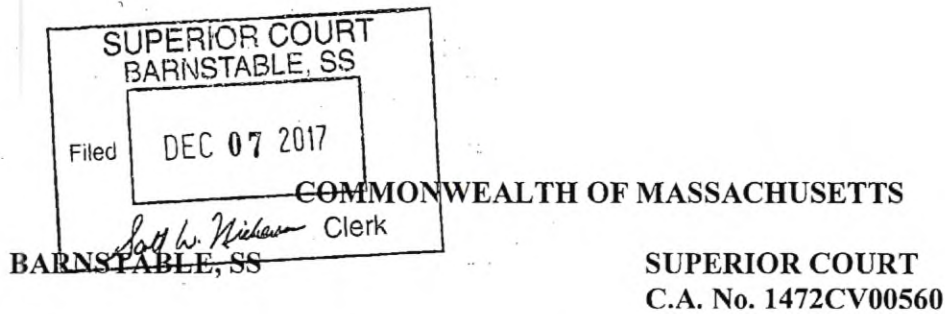
COMPANY NAME	CITY	STATE	PERMIT
			EXPIRATION DATE
U JUMPIN FOULKS	CLARKSVILLE	TN	5/10/2019
ULTIMATE MEGAPARTIES	KNOXVILLE	TN	10/25/2019
ULTIMATE PARTY SUPER STORE. INC	HENDERSONVILLE	TN	6/25/2019
UP N JUMPIN LLC	LURAY	TN	9/5/2019
URBAN AIR ADVENTURE PARK	COLLIERVILLE	TN	10/4/2019
UT RIDLEY 4-H CENTER	COLUMBIA	TN	4/1/2020
V&M RENTALS LLC dba VAUGHN & MASSEY RENTALS	GLEASON	TN	5/30/2019
VALLEY VIEW ZIPS AND ADVENTURES	GREENBRIER	TN	6/8/2019
W.G. WADE SHOWS	LIVONIA	MI	9/1/2019
WAHOO ZIPLINE VIEW, LLC	SEVIERVILLE	TN	7/11/2019
WALLABIES LLC	JOHNSON CITY	TN	6/8/2019
WALLABIES USA, LLC	JOHNSON CITY	TN	6/8/2019
WE GOT BOUNCE, LLC	GALLATIN	TN	10/3/2019
WEARS VALLEY RANCH - CAMP ARROWWOOD	SEVIERVILLE	TN	12/20/2019
WEARS VALLEY ZIPLINE ADVENTURES	SEVIERVILLE	TN	5/22/2019
WEBB SCHOOL OF KNOXVILLE	KNOXVILLE	TN	4/29/2020
WEE BOUNCE LLC	ATHENS	TN	9/12/2019
WEE PLAY PARTY PLACE	UNION CITY	TN	4/27/2019
WESTGATE SMOKY MOUNTAIN	GATLINBURG	TN	8/8/2019
WHITE BLUFF BUILDING SUPPLY	WHITE BLUFF	TN	2/14/2020
WHITE OAK ZIPLINE AND FAMILY FUN CENTER, LLC	GATLINBURG	TN	5/23/2019
WILDERNESS AT THE SMOKIES	SEVIERVILLE	TN	5/3/2019



COMPANY NAME	CITY	STATE	PERMIT
			EXPIRATION DATE
WILTON SPRINGS HARDWARE, LLC	NEWPORT	TN	11/13/2019
WOLFCHASE GALLERIA	MEMPHIS	TN	11/14/2019
WONDERLAND AMUSEMENTS	RIVERVIEW	FL	8/28/2019
WONDERWORKS PIGEON FORGE ATTRACTION, LLC	PIGEON FORGE	TN	5/31/2020
WORLD OUTREACH CHURCH	MURFREESBORO	TN	6/6/2020
XTREME INFLATABLES	MUNFORD	TN	3/1/2020
YMCA CAMP WIDJIWAGAN	ANTIOCH	TN	10/10/2019
YOUR EVENT SOURCE	CHARLOTTE	NC	6/6/2019
YOUTH TOWN OF TENNESSEE	PINSON	TN	1/11/2020
ZIP GATLINBURG	GATLINBURG	TN	3/29/2020
ZIP PIGEON FORGE D/B/A THE DOME ZIPLINES	PIGEON FORGE	TN	3/1/2020
ZOO KNOXVILLE	KNOXVILLE	TN	4/4/2020

# EXHIBIT F





ERIN SULLIVAN, RANDOLPH MORGAN, NANCY ANDREWS and URSULA PRICE,

Plaintiffs

v.

HERITAGE PLANTATION OF SANDWICH, INC., the TOWN OF SANDWICH, PAUL SPIRO, in his capacity as TOWN OF SANDWICH BUILDING INSPECTOR, THOMAS STANTON and HAROLD MITCHELL, ROBERT JENSEN, CHRISTOPHER NEEVEN, ERIK VAN BUSKIRK, JAMES KILLION and DAVID SCHRADER, in their capacities as members of the SANDWICH BOARD OF APPEALS,

Defendants

**PLAINTIFFS' PROPOSED FINDINGS OF FACT**

**I. General Background Facts**

1. Plaintiff, Erin Sullivan, owns real property, including the land and single-family home located at 7 Jonathan Lane, Sandwich, MA 02563. See Joint Pre-trial Memorandum, Stipulated Fact No. 1.

2. Plaintiff, Randolph Morgan, owns real property, including a condominium unit located at 67 Highview Drive, Sandwich, MA 02563, in Highview Condominiums, and common areas of such condominium, and is a party in interest under G.L. c. 40A, § 11. See Joint Pre-trial Memorandum, Stipulated Fact No. 2.

3. Plaintiff, Nancy Andrews, owns real property, including the land and single-family home located at 25 Pine Street, Sandwich, MA 02563. See Joint Pre-trial Memorandum, Stipulated Fact No. 3.

4. Plaintiff, Ursula Price, owns real property, including a condominium unit located at 63 Highview Drive, Sandwich, MA 02563, in Highview Condominiums, and common areas of such condominium, and is a party in interest under G.L. c. 40A, § 11. See Joint Pre-trial Memorandum, Stipulated Fact No. 4.

5. Defendant, Heritage Plantation of Sandwich, Inc. (“Heritage”) is a Massachusetts corporation with a principal place of business located at 67 Grove Street, Sandwich, MA 02563. Heritage operates the Heritage Museums and Gardens.

6. On or about April 30, 1980, the Massachusetts Secretary of the Commonwealth received for filing articles of organization dated April 25, 1980 (the “Articles of Organization”) establishing as a new corporate entity Heritage Plantation of Sandwich, Inc. (“Heritage”).

**Exhibit 1**<sup>1</sup>. Since such filing the Articles of Organization have been amended twice, namely in filings received by the Secretary of the Commonwealth on January 25, 1983 and July 1, 1987.

**Exhibit 2.**

7. On May 17, 2013, Heritage President/CEO Ellen Spear sent an e-mail to Outdoor Venture Group, LLC (“Outdoor Ventures”), a for-profit entity that owns and operates several aerial adventure parks throughout the United States, stating “I am interested in opening a new Adventure Park/Ropes Course . . . [w]e are including this type of feature in our Master Plan. I would like to discuss with your company what is involved with working with your company as a potential designer and operator for us.” See Heritage’s Answer to Complaint, ¶ 24; **Exhibit 291**.

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<sup>1</sup> All exhibits are identified herein by the exhibit number that the Court marked/assigned at trial. For ease of reference, reference to each exhibit is in bold.

8. After Outdoor Ventures' President, Bahman Azarm, responded expressing reciprocal interest, Heritage and Outdoor Ventures began discussing Outdoor Ventures' development of an aerial adventure park on Heritage's property.

9. In an e-mail to Heritage Board member Linda Calmes Jones on June 26, 2013, Ms. Spear stated: "[r]egarding Master Planning, I met with Outdoor Ventures, the company that builds and operates the aerial adventure like we are considering for [the Property]. He walked the property and it is potentially exciting, lucrative and could be done without the other elements of the Master Plan." **Exhibit 292.**

10. On July 23, 2013, Outdoor Ventures sent a proposal (the "Proposal") to Heritage proposing to develop an aerial adventure park at Heritage in two phases, ultimately comprising eight courses and a canopy walkway. **Exhibit 3.** The Proposal projected that the Park would attract 20,000 visitors in its first year, 35,000 visitors in its second year and 50,000 visitors by its fourth year. Id.

11. Upon receipt of the Proposal, Heritage Director of Finance, Paul Chizek, circulated the Proposal internally via e-mail, along with a document entitled "Plan to Implement Aerial Adventures." Id.

12. This "Plan to Implement" document proposed contacting officials from Outdoor Ventures' different aerial adventure parks, asking a series of scripted questions and obtaining information concerning various issues. **Exhibit 4; Exhibit 5.** None of these questions or issues enumerated in the Plan to Implement related to education, but rather addressed issues such as the "accuracy of OVG revenue projections," the "[q]uality/quantity of OVG Promotion and Marketing" and "return on investment," among others. **Exhibit 4.**



13. Heritage contacted officials from Outdoor Ventures' different aerial adventure parks in accordance with the Plan to Implement. Notes from those communications demonstrate that Heritage learned that Outdoor Ventures' visitor projections are regarded as "very conservative." **Exhibit 6.**

14. On August 26, 2013, Outdoor Ventures and Heritage entered into a letter agreement setting forth "certain nonbinding understandings and certain binding agreements between the Heritage Museums & Gardens (HMG) and Outdoor Venture Group Holdings, LLC (OVGH) with respect to a potential contractual arrangement for the development, operation and management of an outdoor aerial adventure park at HMG's grounds in Sandwich, MA." **Exhibit 7.**

15. Between June and November of 2013, Heritage worked with Outdoor Ventures and certain Sandwich town officials to plan the proposed aerial adventure park and the Heritage master plan, of which the proposed aerial adventure park was a component. **Exhibit 399; Exhibit 8** (p. HER-008587); **Exhibit 283.**

16. During this planning process, town officials advised Heritage that the proposed project would not be an as-of-right use and would require a special permit. **Exhibit 399.**

17. Heritage's board of directors approved the Heritage Museums and Gardens Master Plan ("Master Plan") in November, 2013. **Exhibit 8; Exhibit 283.**

18. The Master Plan states that the idea for an aerial adventure park was selected over a cell tower and ground mounted photovoltaic solar array. **Exhibit 8** (p. HER-008612); **Exhibit 283.**

19. The Master Plan depicts the aerial adventure park extending virtually up to the border between Heritage's property and Plaintiffs' property at Highview Condominiums.

**Exhibit 8** (p. HER-008600); **Exhibit 283**; **Exhibit 404**; **Exhibit 9**.

20. In early 2014, two new corporate entities were formed for the purposes of investing in, building and operating a proposed aerial adventure park facility (the "Project," or "Park," or "Aerial Adventure Park") upon two parcels of land that Heritage owns, namely a parcel identified by the Sandwich Assessors as Map 37, Lots 1 (0 Pocasset Road) and 2 (0 Shawme Road) – such parcels shall be referred to herein collectively as the "Property." The Property thus encompasses street addresses that are separate from 67 Grove Street. **Exhibit 10**.

21. The Property is located in the Town's R-1 Residential Zoning District. See Joint Pre-trial Memorandum, Stipulated Fact No. 6.

22. The first such new corporate entity, called HMG LLC, was established via a certificate of organization dated February 12, 2014 and filed with the Secretary of the Commonwealth on February 26, 2014. **Exhibit 11**; **Exhibit 12**.

23. The second of the two new corporate entities, The Adventure Park at Heritage Museums and Gardens, LLC ("Adventure Park LLC"), was established through a certificate of organization dated and filed with the Secretary of the Commonwealth on March 5, 2014.

**Exhibit 13**.

24. Neither HMG LLC nor Adventure Park LLC is a "nonprofit educational corporation" under G.L. c. 40A, § 3. **Exhibit 11**; **Exhibit 12**; **Exhibit 13**.

25. Contemporaneously with the formation of these entities, the parties entered into various agreements in connection with the Project, including a Lease Agreement dated March 19, 2014; The Adventure Park at Heritage Museums and Gardens, LLC Operating Agreement

dated March 19, 2014; the HMG LLC Operating Agreement dated February 12, 2014; the Project Oversight Agreement dated March 19, 2014; the License Agreement dated March 19, 2014; the Construction Agreement dated March 19, 2014. See **Exhibit 14** (Lease Agreement); **Exhibit 15** (Adventure Park LLC Operating Agreement, exclusive of certain exhibits); **Exhibit 16** (HMG LLC Operating Agreement); **Exhibit 17** (Project Oversight Agreement); **Exhibit 18** (License Agreement); **Exhibit 19** (Construction Agreement).

26. Adventure Park LLC is managed by a board of directors comprised of five directors. **Exhibit 15** (Operating Agreement of the Aerial Adventure Park at Heritage Museums and Gardens, § 2.10(a)).

27. The Adventure Park LLC Operating Agreement requires that the majority of the directors on Adventure Park LLC's board shall be appointed by Outdoor Ventures, and further vests Outdoor Ventures with "the sole right to designate, and remove (for any reason or for no reason) and replace, one individual to serve as the Administrative Director," who "shall have the full right, power and authority to manage the business and affairs of the Company on a day-to-day basis, to make (or cause to be made) all decisions relating thereto and to take (or cause to be taken) all actions relating thereto." Id.

28. Mr. Azarm, is a member of the board of directors of the Adventure Park LLC and in Massachusetts Corporations Division records is listed as its Manager. **Exhibit 15** (Operating Agreement of the Aerial Adventure Park at Heritage Museums and Gardens, p. 6); **Exhibit 13**; Heritage's Answer to Complaint, ¶ 24.

29. Adventure Park LLC is comprised of two members, namely, Outdoor Ventures and Heritage. Outdoor Ventures owns a 51% majority interest in Adventure Park LLC. **Exhibit**



15 (Operating Agreement of the Aerial Adventure Park at Heritage Museums and Gardens, Exhibit A).

30. Outdoor Ventures, and not Heritage, operates the Project, is the exclusive employer for all Park employees and pays the salaries and wages of all Park employees, and markets and manages the Park as one of its seven aerial adventure parks nationwide. **Exhibit 294; Exhibit 295; Exhibit 296; Exhibit 297; Exhibit 298; Exhibit 299.**

## **II. General Nature of Park**

31. Outdoor Ventures' website describes aerial adventure parks such as those that it operates as "a relatively new recreational activity in the United States," and notes the importance of ensuring "financial success for the operator." **Exhibit 300** (printout of page from: <http://www.outdoorventures.us/about>).

32. The Lease Agreement states as follows:

In recognition of the substantial expense and resources which will be necessary in connection with the construction and operation of the Park, HM agrees that it **shall not grant the right to undertake any competitive activity relating to the Park** to any other party during the Agreement Term. As used herein, **"competitive activity" shall mean any adventure park, theme park, water park, amusement park, or similar activity.**

Exhibit 14 (Lease, § 25) (emphasis added).

33. Ms. Spear has equated with sports the activities at the Aerial Adventure Park, noting that the Aerial Adventure Park "fits [the] bill" of "sports things to get heads in beds," referring to the concept of using sports activities to draw vacationers to stay at Cape Cod hotels and lodgings. **Exhibit 301**; Trial Transcript ("Trial Tr."), Volume ("Vol.") 4 (testimony from October 24, 2017 trial day), pp. 27-28.

34. Ms. Spear has described the Park as an "economic development project." **Exhibit 302.**

35. Mr. Azarm has described an Outdoor Ventures adventure park as “a playground in the trees.” Trial Tr., Vol. 5, p. 53, ll. 10-11.

36. Outdoor Ventures’ marketing materials describe its aerial adventure parks as offering “Zip Line & Climbing Fun” and “Fun in the Trees,” and describe “The Adventure Park at Heritage Museums & Gardens” as having been “built and operated to serve as an example of recreation with respect appreciation [sic] for the natural environment.” **Exhibit 20; Exhibit 21** (p. 4 of Exhibit).

37. Outdoor Ventures strives particularly to market its adventure parks, including the Project, to “extreme athletes” and “the hard core athlete.” **Exhibit 410**; Trial Tr., Vol. 7, p. 9, ll. 11-14; Vol. 7, p. 10, ll. 6-11.

38. Outdoor Ventures is not an educational company, as Mr. Hines admitted at trial, and Heritage does not regard Outdoor Ventures as equipped to produce significantly educational content. **Exhibit 22**; Trial Tr., Vol. 7, p. 16, ll. 3-4. In an August 17, 2016 *Outside Magazine* online article entitled “Adventure Parks Are the New Amusement Parks,” Mr. Hines stated, with regard to Outdoor Ventures: “When we started, we were the black sheep, because we weren’t educators, team builders, or facilitators . . . We were in it for all the wrong reasons. Well, in the past seven years, the entire world has changed, and virtually everybody is now dependent on the revenue that can be generated from the non-team building, pay-to-play stuff.” Trial Tr., Vol. 6, p. 196, ll. 7-14. In such article Mr. Hines also stated, with respect to Outdoor Ventures’ aerial adventure park business: “I’m not competing for vacation money . . . [m]y competition is the couch, going bowling, going to a movie theater, going out to dinner, doing nothing. It’s a lifestyle thing,” and further stated that the aerial adventure park market is “not even close” to

saturation, noting: "I wouldn't be surprised if five years from now there were 1,500 parks in the U.S." Trial Tr., Vol. 6, p. 197, ll. 14-19; Vol. 6, p. 199, ll. 5-11.

39. The activities at the Aerial Adventure Park are unrelated to Heritage's purposes.

**Exhibit 1.**

**III. Town Permitting Process**

**A. Historic District Committee Review**

40. Because the Property is located in the Old King's Highway Regional Historic District, the Project requires a certificate of appropriateness from the Sandwich Historic District Committee (the "Committee") as a condition precedent to a building permit. Trial Tr., Vol. 1, p. 52, ll. 21-23. Heritage applied for such a certificate on April 1, 2014, and the Committee held a hearing on the application on April 23, 2014. **Exhibit 23.**

41. Due to an error in the application materials, abutters to the Property, including Plaintiffs Mr. Morgan and Ms. Price, never received notice of the application or the Committee's hearing, and did not become aware of the Project until several months after the Historic District Committee decided the application. **Exhibit 23**; Trial Tr., Vol. 2, p. 140, ll. 20-22; Vol. 3, p. 9, l. 22 – p. 10, l. 10; **Exhibit 24.**

42. Therefore, through no fault of their own, Mr. Morgan and Ms. Price could not possibly have appealed the Historic District Committee's decision within the 10-day appeal window provided under the Act.

43. There are Project structures located on both 0 Shawme Road and 0 Pocasset Road that are visible from a public way. Trial Tr., Vol. 1, p. 88, ll. 14-18; Vol. 6, p. 17, ll. 21-24.

44. At the hearing, which comprised approximately five minutes including Heritage's presentation and the Committee's discussion and vote, the Committee voted to approve a



“motion to accept the plans as presented,” and issued a corresponding certificate of appropriateness #14-43 (the “COA”).

45. The plan submitted with the application for the COA and approved by the Historic District Committee was deficient and did not depict the elements comprising the Park’s aerial courses. Trial Tr., Vol. 1, p. 6, ll. 3-7; Vol. 1, p. 7, ll. 9-11; **Exhibit 23**.

**B. Building Permit Applications**

46. On April 24, 2014, upon the Historic District Committee’s issuance of the COA, George Lambros, of Lambros Construction, submitted a “Commercial Building Permit Application” and Massachusetts Department of Public Safety form application (the “Applications”) for a building permit to construct the Project. **Exhibit 25; Exhibit 26**.

47. The Applications erroneously listed the property as Sandwich Assessor’s Map 37, Lot 6 (67 Grove Street) (“Lot 6”), which is not part of the Property and is located across a public way, Shawme Road, from the Property. **Exhibit 25; Exhibit 26; Exhibit 10; Exhibit 255**.

48. After originally denying the application on May 16, 2014 “due to insufficient information,” and notwithstanding that Heritage filed no new building permit application thereafter, on September 18, 2014, Mr. Spiro issued a building permit authorizing the construction of the Project on Lot 6 (the “Building Permit”). **Exhibit 27; Heritage’s Answer, ¶ 32**.

**C. Appeal to Board of Appeals to Challenge Building Permit**

49. On or about September 26, 2014, Defendant Thomas Stanton filed an appeal to the Sandwich Board of Appeals (the “Board of Appeals”) challenging the Building Inspector’s issuance of the Building Permit (the “Appeal”). See Heritage’s Answer to Complaint, ¶ 33.

50. In an e-mail exchange with Heritage Director of Administration & Finance Paul Chizek on September 26, 2014, Heritage President & CEO, Ellen Spear, sought and obtained the names of each of the members of the Board of Appeals. **Exhibit 28.**

51. Thereafter Ms. Spear advised Outdoor Ventures via e-mail that “[w]e’re in a good place regarding the appeal. All ducks in a row and positive feedback from the decisionmakers.”

**Exhibit 303.**

52. On October 20, 2014, Board of Appeals member James Killion transmitted an e-mail to the other members of the Board of Appeals asking “[a]re any of you interested in a site visit to Heritage on Saturday?” **Exhibit 29.**

53. Mr. Killion followed with an e-mail to Board administrator Marilyn Bassett asking Ms. Bassett to arrange the visit and noting that “[t]he board members would like a brief overview of the project as it relates to the hearing on the appeal of the Building Inspector’s decision for the Zip Line attraction.” **Exhibit 30.**

54. The Board scheduled this meeting (the “First Hearing Session”) for Saturday, October 25, 2014 and posted an agenda therefor dated October 22, 2014. **Exhibit 31.**

55. Although the agenda identified the location of the First Hearing Session as 67 Grove Street, the Site Meeting was held at 0 Shawme Road and 0 Pocasset Road. **Exhibit 32;** Trial Tr., Vol. 3, p. 66, ll. 11-17.

56. The Board provided no notice of the First Hearing Session, either by newspaper publication or mailing to parties in interest. Trial Tr., Vol. 2, p. 141, ll. 8-11; Vol. 3, p. 10, l. 24 – p. 11, l. 1.

57. The agenda for the First Hearing Session stated that the meeting was a "Site Visit for informational purposes only to view location of proposed Zipline," and contained no reference to the possibility of there being any discussion during the meeting. **Exhibit 31.**

58. Mr. Morgan and Ms. Price received no notice, and lacked actual knowledge of, the First Hearing Session, and did not attend it. Trial Tr., Vol. 2, p. 141, l. 19 – p. 142, l. 1; Vol. 3, p. 10, l. 11 – p. 11, l. 5.

59. The First Hearing Session lasted approximately one hour. Trial Tr., Vol. 3, p. 67, ll. 6-7; Vol. 5, p. 130, l. 20.

60. At the First Hearing Session, Heritage presented to the Board and Board members asked questions of Heritage regarding issues relating to Heritage's assertion that the location and certain features of the Park would be educational under G.L. c. 40A, § 3, including the location of the Park signage relative to the aerial ropes and zip-line courses, "where the adventure park would be located," the correlation between trees marked on site and trees identified on plans as being part of the aerial courses, the layout and extent of the park, from one end to the other, a plastic ear trumpet implement that Heritage claims allows one to "hear the trees," the "approximate distance of project to houses in the area," and other issues. Trial Tr., Vol. 3, p. 66, l. 23 – p. 67, l. 20; Trial Tr., Vol. 4, p. 34, l. 25 – p. 35, l. 4; Vol. 5, p. 162, ll. 6-14; **Exhibit 369** (video of October 28, 2014 meeting).

61. The questions, answers and information discussed between the Board and Heritage at the Site Meeting addressed and involved substantive issues of significance to the Appeal, including, among others, Heritage's assertion that the location and certain features of the Park would be educational under G.L. c. 40A, § 3. Trial Tr., Vol. 3, p. 66, l. 23 – p. 67, l. 20; Vol. 5, p. 162, ll. 15-23; **Exhibit 369.**



62. Mr. Morgan and Ms. Price were deprived of the opportunity to see and hear about the locations that Heritage was proposing for the Park's aerial courses and signage that Heritage claimed to be "educational," among other issues discussed at the First Hearing Session.

63. Such information could have better equipped Mr. Morgan and Ms. Price to evaluate or challenge Heritage with respect to issues such as the positioning of the signage, the extent to which aerial course patrons would be able to view or read such signage, the number of signs to be installed, and the interplay between the signage/aerial courses and elements of nature that Heritage has relied upon as supposedly lending to the Project's purportedly educational nature, among other issues.

64. No meeting minutes were prepared or approved with respect to the First Hearing Session. **Exhibit 33** (showing absence of any such meeting minutes).

65. On October 28, 2014, the Board of Appeals met, heard presentations from Heritage and members of the public, and received submissions from members of the public. Trial Tr., Vol. 5, p. 178, ll. 21-24; **Exhibit 369**.

66. Following such presentations the Board of Appeals voted to close the public hearing and take the matter under advisement, at which point the Board proceeded to the next item on the agenda and most or all of the more than 100 attendees of the public hearing left the meeting. Trial Tr., Vol. 5, p. 178, l. 24 – p. 179, l. 2; **Exhibit 369**.

67. Later that evening the Board returned to the Appeal and commenced deliberations. Trial Tr., Vol. 5, p. 179, ll. 2-4; Vol. 1, p. 57, ll. 12-14; **Exhibit 369**.

68. During its deliberations, after closing the public hearing, the Board received an oral presentation from Mr. Spiro. Trial Tr., Vol. 1, p. 57, ll. 21-23; Vol. 5, p. 179, ll. 3-5; **Exhibit 369**.

69. After deliberating for approximately seven minutes, and without reviewing the submissions received at the hearing from members of the public, the Board voted to deny the Appeal. **Exhibit 369**; Trial Tr., Vol. 5, p. 179, ll. 3-7.

70. Following the Board's vote, a written decision was issued, dated and filed with the Sandwich Town Clerk on October 29, 2014. **Exhibit 34**. The board never voted on such written decision, nor did it designate any member to issue a written decision on its behalf in connection with the Appeal. **Exhibit 369**.

#### **IV. True Nature of Project**

71. Charles Owen Dexter was a rhododendron hybridizer who died in 1943. Trial Tr., Vol. 4, p. 35, ll. 5-7. Mr. Dexter did not breed rhododendrons on the Property. Trial Tr., Vol. 5, pp. 96-97; **Exhibit 304**.

72. In attempting to persuade the Sandwich Building Inspector and the Sandwich Board of Appeals that G.L. c. 40A, § 3 applied to the Project, the primary feature upon which Heritage relied was location, as Heritage contended that the Park "will be located on the portion of Heritage's property where world-famous rhododendron hybridizer, Charles Dexter, hybridized hundreds of varieties of the plant . . . **Exhibit 35**." In this litigation, Heritage's President and CEO, Ellen Spear, filed an affidavit in which she stated "The aerial exhibit will be located on a portion of the Museum's property that includes the test fields used by Charles Dexter." **Exhibit 36** (Spear Affidavit, ¶ 6).

73. Heritage now admits that this statement is untrue. Trial Tr., Vol. 5, pp. 96-97; **Exhibit 305**; **Exhibit 304**.

74. Rhododendrons are not prominently visible at the Property, and in any event are in bloom at Heritage only for approximately two weeks annually. Trial Tr., Vol. 6, p. 18, ll. 4-11; Vol. 3, p. 67, l. 24 – p. 68, l. 5; Vol. 2, p. 143, ll. 5-16.

75. Another basis upon which Heritage asserted that the Park was educational was that “[n]o visitor will be permitted to participate in the aerial portion of the Exhibit without first receiving educational instruction, both in the safe use of the Exhibit and regarding the Museum itself.” **Exhibit 35; Exhibit 37; Exhibit 127.** Heritage characterized this “instruction” as “a key component to the” Project. **Exhibit 35; Exhibit 37;** Trial Tr., Vol. 6, p. 13, ll. 1-7.

76. Such “instruction” refers to an orientation session (the “Safety Orientation”) of approximately 30 minutes that aerial course visitors (called “Climbers”) are required to attend before embarking upon the aerial courses. Trial Tr., Vol. 4, p. 36, ll. 12-19; **Exhibit 38.**

77. The Safety Orientation is conducted by one of the Park’s Part Time Employees and addresses how to use the harnesses and other safety equipment on the aerial courses. Trial Tr., Vol. 4, p. 36, ll. 12-22; Vol. 5, p. 66, ll. 19-22; Vol. 2, p. 80, ll. 17-21; **Exhibit 21** (email from A. Wellman attaching document sent to a radio station for an advertising read, referencing a “safety briefing” and “interactive safety briefing”); **Exhibit 38; Exhibit 39; Exhibit 40; Exhibit 41; Exhibit 42.**

78. The Safety Orientation focuses on the safe use of the harnesses and Park equipment and does not involve discussion regarding Heritage’s offerings, programs, history, horticultural collection or any Heritage-related items that reasonably could be described as educational. Trial Tr., Vol. 4, p. 36, ll. 12-22; Vol. 2, p. 81, l. 10 – p. 82, l. 5; **Exhibit 21; Exhibit 38; Exhibit 39; Exhibit 40; Exhibit 41; Exhibit 42.**



79. No Heritage employee has any role in the Safety Orientation. Trial Tr., Vol. 4, p. 36, ll. 20-22; Vol. 2, p. 80, ll. 14-16.

80. The statement in Heritage's March 28, 2014 letter to the Sandwich Building Inspector that "no one is allowed to participate in the exhibit without first receiving the educational instruction," is false. **Exhibit 37.**

81. The Building Inspector relied on this erroneous statement in determining that G.L. c. 40A, § 3 applied to the Project. Trial Tr., Vol. 1, p. 68, ll. 11-14; Vol. 1, p. 70, ll. 5-15.

82. The parties planned to "open the [Project] to the public by Memorial Day" of 2014. **Exhibit 37; Exhibit 128; Exhibit 129; Exhibit 354;** Trial Tr., Vol. 4, p. 36, ll. 23-25.

83. As of April 1, 2014, Heritage had not commenced development of any of the Project features that it claims to be educational. **Exhibit 43.**

84. As of October 29, 2014, Heritage had not developed any of the Project features that it claims to be educational. **Exhibit 44; Exhibit 355; Exhibit 45; Exhibit 46; Exhibit 47; Exhibit 48** (email from J. Crocker dated 9/17/14 referencing "another new assignment – 7 signs for Aerial Adventure."); **Exhibit 49; Exhibit 50; Exhibit 51; Exhibit 52; Exhibit 53.**

85. The Park consists of five aerial courses (the "Aerial Courses") comprising 69 zip line and other elements affixed to, and suspended within and between, trees. See Exhibit 54 (As-Built Plans); **Exhibit 55.**

86. The Aerial Courses are named "Mountain Trail," "Sunshine," "Waterfall," "Forest Run" and "Black Storm," and each is color-coded to denote level of difficulty, namely yellow ("easy to moderate" level of difficulty), green ("moderate to challenging" level of difficulty), blue ("challenging" level of difficulty) or black ("advanced; extremely challenging" level of difficulty). **Exhibit 54; Exhibit 56; Exhibit 57** (photo of Park signage, including

reference to purple course notwithstanding that currently there is no purple aerial course at the Park).

87. At trial, Ms. Spear admitted that she did not know the names of the Aerial Courses, and was unable to correctly identify the color codes or levels of difficulty of the Aerial Courses. Trial Tr., Vol. 4, p. 37, ll. 4-12; Vol. 5, p. 21, ll. 9-12. Nor was Ms. Spear able to correctly identify or describe number and nature of the elements of the Aerial Courses. Trial Tr., Vol. 4, pp. 37-39.

88. The Aerial Courses are, for all intents and purposes, the same as the aerial courses at the other aerial adventure parks that Outdoor Ventures operates, and photographs from such other parks have been used interchangeably to market the Project. **Exhibit 58; Exhibit 35.**

89. The Park features one yellow course, one blue course, two green courses and one black course. The Project's black color-coded course, Black Storm, is limited to individuals aged 12 years and older, or 14 years and older if unaccompanied by an adult. **Exhibit 56.** The Project's blue color-coded course, Forest Run, is limited to individuals aged 10 and older, or aged 12 and older if unsupervised or unaccompanied by an adult. **Exhibit 56.**

90. Within the Aerial Courses collectively there are five signs (the "Aerial Signs") affixed to trees at the Property. **Exhibits 59A – 59J** (photographs of Aerial Signs); **Exhibit 60; Exhibit 61.**

91. At trial, Ms. Spear was unable to identify the number of Aerial Signs, notwithstanding that there are only five. Trial Tr., Vol. 4, p. 40, ll. 14-16.

92. The Aerial Signs contain brief statements that, Heritage contends, teach physics principles.

93. The Aerial Signs were conceived of and prepared months after the Board decided the Appeal. **Exhibit 62; Exhibit 63; Exhibit 64; Exhibit 65.**

94. Heritage did not mention the idea of Aerial Signs during the Hearing, and a detailed Project budget circulated between Outdoor Ventures and Heritage on July 30, 2014 contemplated no Aerial Park signage other than a "Main Entrance" sign. **Exhibit 35; Exhibit 306.**

95. The Aerial Signs were placed "out of the way of [Aerial Course] activities" and largely go unnoticed among Climbers in the Aerial Courses. **Exhibit 64; Exhibit 66;** Vol. 2, p. 82, ll. 12-15.

96. Physics principles cannot meaningfully be taught, understood or retained on the basis of one's view of the Aerial Signs. Trial Tr., Vol. 2, p. 97, ll. 5-11.

97. The Aerial Signs are incorrect, confusing, and of no meaningful or significant educational value. Trial Tr., Vol. 2, pp. 88-99.

98. In the development of the Aerial Signs, Outdoor Ventures sent correspondence to Heritage stating as follows with respect to the Aerial Signs: "Suggestion from OV is to keep the content basic. Our goal is to keep people moving through the course and they won't necessarily have time to read complicated scientific signs. Something bite size. Many of our customers are families so something that mom/dad can easily, quickly explain to kids would be ideal." **Exhibit 67.**

99. Further, Jan Crocker, a Heritage employee responsible for preparing the text of the Aerial Signs, described as follows her approach to preparing the Aerial Signs: "The reason I went simple is visitors don't absorb science easily when they read. Believe me, I've worked at a



place that tried pushing science comprehension through labels and too many words turned visitors away.” **Exhibit 68.**

100. In a separate communication prepared contemporaneously with her drafting of edits to the Aerial Signs’ text, Ms. Crocker stated that “[v]isitors will be completely focused on not falling out of the trees” and “aren’t going to be reading labels carefully!” **Exhibit 66.**

101. When Mr. Wellman expressed concerns that the Aerial Signs “might slow down throughput,” “might distract climbers from climbing-specific or cautionary signs,” and “might distract climbers from focusing on their climbing,” Mr. Azarm responded that the Aerial Signs were needed because Heritage was “selling the course to the public as an educational experience – the permit is conditional to this.” **Exhibit 307**; Trial Tr., Vol. 5, p. 56, ll. 9-13.

102. At trial Mr. Azarm testified that notwithstanding any “educational facet of reading” the Aerial Signs, the reading of the Aerial Signs is “not the educational part” of the experience. Trial Tr., Vol. 5, p. 44, ll. 5-8.

103. On the Property, at ground level, there is a path cordoned by thin rope (the “Ground Path”) within which there are 10 posts to which signs are attached. **Exhibit 69A-69GG**; **Exhibit 70**; **Exhibit 71**; Trial Tr., Vol. 3, pp. 69-71; **Exhibit 138.**

104. The Ground Path is approximately 1,300 feet long and 5-8 feet wide. **Exhibit 72.**

105. Admission to the Ground Path is free and does not require the purchase of an admission ticket for the Project. **Exhibit 73**; **Exhibit 74**; Trial Tr., Vol. 3, p. 69, l. 22 – p. 70, l. 1; Vol. 4, p. 42, l. 17 – p. 43, l. 4; Vol. 5, p. 141, ll. 1-4.

106. Similarly, one can use the Aerial Courses without entering or walking along the Ground Path.

107. In marketing materials, Heritage identified the Ground Path, Aerial Signs and the “climb itself” as the lone “educational elements of the” Project. **Exhibit 75; Exhibit 76.**

108. Patrons of Heritage Museums and Gardens are entitled to enter the Ground Path. Trial Tr., Vol. 4, p. 42, ll. 17-25. However, such patrons are not entitled to enter or participate in the Aerial Courses unless they pay the separate Park admission fee or purchase a “combo ticket.” Trial Tr., Vol. 4, p. 43, ll. 1-11. Patrons of the Aerial Adventure Park are entitled to enter the Ground Path if desired.

109. The Ground Path is distinct from the Park, is not a bona fide part of the Park or, at best, adds no significant educational value to the Park. **Exhibit 73; Exhibit 74;** Trial Tr., Vol. 3, pp. 69-71.

110. On June 17, 2015, approximately one month after the Park first was opened to Climbers, Heritage’s Jan Crocker stated: “I wish more visitors were interested in the [Ground Path], but they are there for climbing and the obstacle course in the trees.” **Exhibit 77.** At trial, Heritage’s expert, Susan Wilkening, testified that “at any museum most people don’t read every single word on every sign,” but rather, “what we see is that most signs are not read or they might be used as a resource as needed.” Trial Tr., Vol. 6, p. 152, l. 23 – p. 153, l. 1.

111. In its submission to the Board for the Hearing, Heritage stated that “[m]any of Heritage’s exhibits are made available to school groups and, it is intended that this Exhibit will also become a part of the Museum’s school-group offerings.” **Exhibit 35** (October 23<sup>rd</sup> letter, p. 4).

112. This statement refers to workshops that Heritage offers to school groups and youth camps (the “Workshops”) and that Heritage contends are related to the Project. **Exhibit**

**35; Exhibit 78.** The Workshops are distinct from the Park, are not a bona fide part of the Park or, at best add no significant educational value to the Park.

113. Initially, Heritage offered two Workshops entitled "Sizing Up Trees" and "Workings of a Woodland" and were available to middle school students. Exhibit 94; Exhibit 95. Currently there are three Workshops: "Eco-Adventure Workshop" (offered to school groups in grades 6-8); "Math Adventure Workshop" (offered to school groups in grades 8-12); and the "Leadership Adventure Workshop" (offered to school groups in grades 8-12). **Exhibit 79.** Workings of a Woodland now "takes place over on the museum grounds" and is unaffiliated with the Aerial Adventure Park. **Exhibit 80; Exhibit 81.**

114. Each Workshop lasts 50 minutes, is offered only to school or youth camp groups, and is offered separately from the Aerial Courses, such that school or camp groups may attend one of the workshops without participating in the Aerial Courses, and, conversely, may participate in the Aerial Courses without attending a workshop. Heritage Second Supplemental Answer to Interrogatory No. 24; **Exhibit 82; Exhibit 78;** Trial Tr., Vol. 5, p. 145, ll. 11-21.

115. The Workshops are available to school and youth camp groups exclusively. Exhibit 35; **Exhibit 83; Exhibit 76; Exhibit 84; Exhibit 85; Exhibit 78.**

116. Each Workshop costs \$11 to attend, a charge separate from the \$45 Park admission charge. **Exhibit 83;** Trial Tr., Vol. 4, p. 43, ll. 5-6.

117. The Workshops are part of Heritage's group of "Museum Learning" program offerings separate from the Park (like Heritage's student program on "building a car") and are delivered by Heritage employees, rather than Adventure Park staff. **Exhibit 83; Exhibit 86** (John Hines e-mail referencing "'Climb & Learn' add on that I am working on with Andrea



(adds a 1 hour programs [sic] that HMG already does for grades 5-7"); **Exhibit 87**; **Exhibit 88**; **Exhibit 89**.

118. Of the 28 school or camp groups that visited the Aerial Adventure Park between June 6, 2016 and July 2, 2016, none participated in a Workshop. Rather, each such group did the "climb only." Attendance listings presented at trial demonstrate that groups scarcely attend a Workshop in conjunction with the Aerial Adventure Park. **Exhibit 90**; **Exhibit 365**; **Exhibit 366**; **Exhibit 367**; Trial Tr., Vol. 5, p. 146, ll. 1-5; Trial Tr., Vol. 5, p. 155, ll. 12-14.

119. Heritage sought to superimpose the Ground Path, Aerial Signs and Workshops to engraft the Park with educational content, in an attempt to cloak the Park with protection under G.L. c. 40A, § 3. For example, Ms. Spear acknowledged that the Workshops would be "special upcharge optional programs" to be developed "in conjunction with aerial" in an effort "[t]o address the exhibit/education thing." **Exhibit 91**; Exhibit 87 (email exchange in which H. Mead tells E. Spear that in proposing workshop options she "was going for options that sounded well-planned, meaty, and real," and E. Spear responded that she was "trying to connect [the Workshops] to the physical space" of the Aerial Adventure Park)]; **Exhibit 92** (April 27, 2014 e-mail in which Ms. Spear states: "Essential that the educational stuff is in place before we open and before media gets here.").

120. In April, 2014, Heritage planned to have the Park open no later than June, 2014. Trial Tr., Vol. 4, p. 36, ll. 23-25; **Exhibit 19** (Construction Agreement; Section 4.1.2).

121. Heritage had not internally even assigned anyone to begin to "come up with an educational framework for" the Project until April 1, 2014, nearly one year after first soliciting Outdoor Ventures and several months after completing its Master Plan. **Exhibit 43**.

122. As of May 19, 2014, Heritage was not even sure whether it or Outdoor Ventures would design the “educational signage for the adventure park,” and development of the Workshops and Ground Path did not commence in earnest until November, 2014 and into April, 2015. **Exhibit 355; Exhibit 45; Exhibit 46; Exhibit 47; Exhibit 48; Exhibit 49; Exhibit 50; Exhibit 51; Exhibit 52; Exhibit 53.**

123. The initial draft text for the Ground Path signage was not drafted until approximately January 9, 2015, nor was the location of the Ground Path first discussed until January, 2015, nearly two months after this litigation was commenced.

124. The Aerial Courses are “self-guided,” rather than set up to be completed in teams or groups or for team building exercises, and other than the Safety Orientation, there is “no mandated period of interaction between the park staff and the climbers.” Trial Tr., Vol. 5, p. 6, ll. 9-20; Vol. 5, p. 67, ll. 7-11; Vol. 6, p. 196, ll. 7-14; Vol. 6, p. 197, ll. 1-3; Vol. 6, p. 202, ll. 9-12.

125. The act of navigating the Aerial Courses is predominantly a recreational activity, rather than an educationally significant one.

126. Admission to the Park requires the payment of an admission fee that is separate from the fee paid for admission to the Heritage Museums and Gardens. **Exhibit 42; Exhibit 107;** Trial Tr., Vol. 5, p. 145, ll. 11-15.

127. In 2015, the daily admission fee for the Park was \$43, the daily admission fee for Heritage Museums and Gardens was \$18, and the fee for a one-day “combo ticket” (entitling a patron admission to both Heritage Museums and Gardens and the Park) was \$53. **Exhibit 107.**

128. In 2016, the daily admission fee for the Project was \$43, the daily admission fee for Heritage Museums and Gardens was \$18, and the fee for a one-day combo ticket was \$53.

Trial Tr., Vol. 4, p. 43, ll. 7-8. In 2017 the Park increased the daily admission fee to \$45. Trial Tr., Vol. 4, p. 43, ll. 5-6; **Exhibit 42**.

129. The purchase of a ticket for the Project entitles patrons to access the Aerial Courses for a maximum period of 2 hours and 30 minutes, inclusive of the time for the Safety Orientation. Trial Tr., Vol. 5, p. 64, l. 21; Vol. 2, p. 80, ll. 8-9.

130. In 2015 the Project was open for a total of 132 days, the first of which was May 15, 2015 and the last of which was November 7, 2015. **Exhibit 94**.

131. During such 2015 season, the hours of operation were: 9:00 a.m. to 6:00 p.m.

132. The recorded number of Climbers during the 2015 season was 19,361. **Exhibit 94**. Of those, 17,922 visitors purchased individual tickets for the Project, and 1439 visitors purchased a combo ticket. Id.

133. In 2016 the Project was open for a total of 141 days, the first of which was April 16, 2016 and the last of which was November 13, 2016. **Exhibit 95**.

134. During such 2016 season, the hours of operation were: 8:00 a.m. to 8:00 p.m. **Exhibit 96**.

135. The recorded number of Climbers during the 2016 season was 31,145. Id. Of those, 29,256 visitors purchased individual tickets for the Project, and 1,889 visitors purchased a combo ticket. Id. On September 19, 2017, Heritage advised that as of September 14, 2017 (i.e., through the first 139 days of the Aerial Adventure Park's operation in 2017), the recorded number of Climbers was 26,187; 24,751 of whom had purchased individual tickets and 1,436 of whom purchased a combo ticket. **Exhibit 423**.

136. The lease that governs the Park's use of the Property defines the "leased area" to be "that area of unimproved land located in Sandwich, Massachusetts more particularly



described on Exhibit A attached hereto (the "Park Area")." Exhibit 14 (Lease agreement, § 1(a)).

137. The leased area encompasses land beyond the area of land that the Project physically occupies. Trial Tr., Vol. 4, p. 50-51.

138. After testifying that she could identify the leased area on a map, Ms. Spear reversed her testimony and said that she could not identify even the approximate location of the leased area on a map, and Heritage claims that the description of the leased area that was attached to the Lease does not exist. Trial Tr., Vol. 4, p. 50-51.

139. Heritage and the Park have distinct promotional activities that exclude the other. For example, Heritage hosts two annual "Free Fun Fridays" in which admission to the Museum is free. The Adventure Park does not discount its admission charge for Free Fun Fridays. Trial Tr., Vol. 4, p. 53, ll. 17-19.

140. The Aerial Adventure Park hosts themed days with no bona fide educational value. For example, the Park has hosted events such as "Dress Like Your Favorite Superhero Day," "National Ice Cream Day," "Tie Dye Tuesday," "'Selfie Saturday' Photo Contest," "Ode to a Summer Classic: Jaws," a Halloween event called "Tweezle-N-Treat," "Singles Night," "National Talk Like a Pirate Day," "Red Sox Day," and "Patriots Football Day." **Exhibit 97; Exhibit 98.**

141. As a priority marketing strategy Outdoor Ventures endeavors to implement a company-wide marketing strategy to "create activities that appeal specifically to the extreme athletes," "to support the promotion of extreme athletic pursuits in [Outdoor Ventures'] parks," and to "specifically target the hard core athlete." **Exhibit 410;** Trial Tr., Vol. 7, p. 9, ll. 11-14;

Vol. 7, p. 10, ll. 6-11. At trial Mr. Hines agreed that “Cross Fitters love” aerial adventure parks.

Trial Tr., Vol. 6, p. 200, ll. 23-25.

142. Outdoor Ventures and Heritage agreed upon an area of geographic exclusivity within which they mutually agreed not to “open another adventure park.” **Exhibit 14** (Lease Agreement).

143. Heritage and/or Adventure Park LLC retained Regan Communications Group (“Regan”) to provide public relations services in connection with the Project. **Exhibit 308; Exhibit 309**. A description of some of Regan’s services are set forth in the Marketing Communications Plan dated April, 2014 (a virtually identical version of which Regan issued again dated February 25, 2015 under the title “Public Relations Proposal for The Adventure Park”). **Exhibit 308; Exhibit 309**.

144. The Marketing Communications Plan identified as a “Core Objective” the marketing of the Park “as the premier destination for active lifestyle enthusiasts,” and enumerated as “Objective 1” to “Position The Adventure Park at Heritage as a premier outdoor recreational destination.” **Exhibit 308** (Marketing Communications Plan, p. 2).

145. To accomplish these objectives, the Plan enumerated “tactics” such as the following: “Invite fitness media and bloggers to experience The Adventure Park at Heritage, with a special focus on targeted markets (i.e. climbing enthusiasts, corporate team building, school athletics, etc.);” “Position The Adventure Park at Heritage’s spokespeople as experts when the news cycle presents opportunities. Potential topics include the following: Physical fitness challenges for children; Holiday gift ideas for the exercise and lifestyle enthusiast;” “developing a ‘climbing club’ for The Adventure Park . . . [and] Invite local trainers, physical therapists, etc. to kick off The Adventure Park’s ‘climbing club;”” “Invite the First Family to

visit The Adventure Park at Heritage and talk about importance of physical fitness;" "Identify a local personal trainer who's willing to serve as a spokesperson on behalf of The Adventure Park to further build the credibility of The Adventure Park at Heritage in the marketplace;" "Promote the combination of Heritage Museums & Gardens and The Adventure Park at Heritage as a fitness lover's dream, where visitors can combine healthy walking on HMG's trails with a more extensive exercise approach on the 'climbing trails;" "Possible pitch angle is using the exercise component of Park participation as a way to fight childhood obesity;" and "Consider partnering with a well-known personal trainer who can speak to safe and effective training when climbing."

**Exhibit 308.**

146. The Park's website is located on the internet at the following address:

[www.heritageadventurepark.org](http://www.heritageadventurepark.org). **Exhibit 96.**

**V. Political Influences**

147. Ms. Spear met separately with each member of the Sandwich Board of Selectmen to discuss the Project. Trial Tr., Vol. 4, p. 60, ll. 5-8; **Exhibit 310.**

148. Throughout 2013 and 2014, Ms. Spear was, along with a member of the Board of Selectmen, a member of the Board of Directors of the Sandwich Economic Initiative Corporation (the "SEIC"), which is a "state chartered economic development corporation for the Town of Sandwich Massachusetts" established in 2010 by Chapter 40 of the Acts of 2007, and is described on its website as a "quasi-public agency" that is "a public-private partnership operating as a sec. 501(c) nonprofit corporation with municipal and private investors working to foster economic development, job growth and community revitalization and development in the town."

**Exhibit 311;** Trial Tr., Vol. 4, p. 60, l. 24 – p. 61, l. 2.



149. SEIC has an office at Sandwich Town Hall and its meeting minutes are available on the Sandwich Town Website. **Exhibit 311.**

150. On March 27, 2014, Heritage advised Outdoor Ventures that it was “doing behind the scenes conversations” to lobby the Town to conclude that the Project was an “as-of-right” use and did not require a special permit. **Exhibit 312.**

151. In particular, Heritage worked to curry the support of Sandwich Town Manager George “Bud” Dunham. Mr. Dunham was part of the team that reviewed and helped develop Heritage’s Master Plan. **Exhibit 8; Exhibit 283; Exhibit 399.** The Project is part of Heritage’s Master Plan. **Exhibit 8; Exhibit 283.**

152. Heritage worked closely with Mr. Dunham with regard to a plan to realign roadways surrounding the Project, to help facilitate traffic flow serving the Project.

153. At all salient times, Mr. Dunham has had exclusive authority over Mr. Spiro’s employment. Trial Tr., Vol. 1, p. 5, ll. 12-23.

154. In an e-mail to Mr. Spiro and others on June 12, 2014 regarding the Project, Mr. Dunham admitted the following:

This one is blowing up and I need to get brought up to speed quickly. Rep. Hunt made some snide remark about holding up the zip line project at this morning’s Chamber meeting and wants a meeting with me (note: he’s on the Board of Directors at Heritage). Ellen Spear, after addressing topic before the meeting started, came up to me at the end of the meeting and wants a one-on-one meeting with me stating that the project is now delayed until next spring and she has \$150K worth of equipment sitting on the ground. Now that we’re clearly being trashed and blamed, I need all the ammo I can to defend us. I’m sure it’s only going to get worse.

Could you compile any information you have so we can meet and I can get briefed? I understand several department heads were at the October 2013 site plan review meeting so it might be helpful to get their notes as well. How about we meet Monday morning, 6/16, at 9:00 am. at JSD? If not, would the same time work on Wednesday, 6/18?

Thanks. This one's only going to get worse and I believe the public trashing of us all has begun.

**Exhibit 377.**

155. Heritage solicited Mr. Dunham's assistance in working with Mr. Spiro after Mr. Spiro advised Mr. Lambros that the Project would require a zoning variance by virtue of its inclusion of structures that were higher than permitted under the Sandwich Protective Zoning Bylaw (the "ZBL") and within the restricted setback set forth under the ZBL. Trial Tr., Vol. 1, p. 18, ll. 22-24; Vol. 1, p. 22, ll. 12-16; Vol. 1, p. 40, ll. 22-25; **Exhibit 388; Exhibit 313; Exhibit 314; Exhibit 315** (G. Lambros email to E. Spear, et al. on 6/17/2014, stating that P. Spiro was "standing firm on the platforms in the trees as being a structure"); **Exhibit 401; Exhibit 316; Exhibit 382; Exhibit 380; Exhibit 384; Exhibit 385.**

156. Mr. Lambros relayed to Heritage, Outdoor Ventures and Adventure Park LLC officials that Mr. Spiro was "standing firm on the platforms in the trees as being a structure" so as to require a variance for the Project. **Exhibit 315.**

157. Within this e-mail thread Ms. Spear responded: "I meet with the Town Manager tomorrow and expect that we will make positive headway." **Exhibit 317.**

158. Mr. Spiro reversed his position largely on the basis of both direct and tacit pressure from Mr. Dunham. **Exhibit 382; Exhibit 380; Exhibit 384; Exhibit 385; Exhibit 386.**

159. For example, after Mr. Spiro had determined that the Project would require a variance, Mr. Dunham met with Ms. Spear, **Exhibit 401**, asked that Mr. Spiro seek an opinion from counsel, on the grounds that "this one is not going to die a natural death," **Exhibit 384**, gave Heritage a direct line to town counsel in connection with this analysis, and reminded Mr. Spiro that "we don't want to be left hanging from a non-supportive zip line!" **Exhibit 384.**

160. Mr. Spiro acknowledged that in pursuing a building permit, Heritage was “making [Mr. Dunham’s] life miserable,” and in internal e-mails Mr. Dunham described these dealings as “a pain” and referenced Ms. Spear’s “pushiness” and “gall.” **Exhibit 387; Exhibit 385.**

161. Mr. Spiro reversed his determination that a variance was required, in the “hope[s]” that such a reversal would “give [Heritage] the impression that we are helping [it] along with the project by not denying and having [Heritage] go before the ZBA requesting an appeal of my zoning opinion; which I believe would not get overturned.” **Exhibit 385; see also Exhibit 382; Exhibit 380; Exhibit 384; Exhibit 386.**

162. Mr. Dunham communicated this outcome to Heritage via e-mail on June 25, 2014, citing the Town’s desire to avoid “add[ing] even more time to the permit process,” and thereafter forwarded such e-mail to Mr. Spiro, thanking him for “all the patience on this one,” and noting “I couldn’t go through life like that.” **Exhibit 386.**

163. Thereafter, Mr. Dunham sent a message to Mr. Spiro conveying Heritage’s gratitude for the “help[]” that he and others lent to the Project. **Exhibit 403.**

164. Internally Heritage has recognized that Mr. Spiro “has been really good to” Heritage. **Exhibit 318.**

165. Mr. Spiro reversed his opinion to “help[] [Heritage] along with the [P]roject” notwithstanding that in connection with Mr. Spiro’s review of this matter, Mr. Lambros had provided him with a communication forwarded by Ms. Spear in which Heritage’s counsel acknowledged that the argument “that the setback requirement does not apply” to the Project “will be a difficult argument to make, and it is possible that a building permit would be denied,



requiring a variance from the Zoning Board of Appeals.” **Exhibit 315; Exhibit 385; Exhibit 379.**

166. Despite reversing his position to “help[] [Heritage] along with the [P]roject,” in actuality Mr. Spiro believes to be true his original interpretation that the Project structures are subject to the setback requirement of the ZBL. **Exhibit 385.**

167. As constructed the Project includes platforms and other elements within the 30-foot setback. **Exhibit 54.**

168. George Lambros, the contractor hired by Adventure Park LLC to obtain a building permit for the Project, lamented what he called Ms. Spear’s “political antics.” **Exhibit 390.**

169. Further, in explaining the decision to “postpone” the construction of the Project from May, 2014 to “late fall-early winter” of 2014-2015, another then-Adventure Park LLC director, Ralph Selvaggi, noted that Ms. Spear “would like to push forward with the permits because she needs to appease some political contacts that have helped her apply for state assistance to improve [the] access road” serving the Project. **Exhibit 319.**

170. Mr. Spiro and then-Town Planner, Nathan Jones, originally suggested that Heritage apply for a special permit for the Project. **Exhibit 391.**

171. Mr. Spiro summarized as follows meetings that he and Mr. Jones had with Heritage regarding the Project in the spring of 2014:

There was a pre-plan meeting back in I believe April when this was first brought to our attention. . . [a]t that time, Nate and I informed them that it was our opinion that they should go before the ZBA for a SP. . . [t]he CEO didn’t like the sound of that and called for a later meeting with just Nate and I and her counsel, Eliza Cox, to make the “free TV offer if you bought a time share sell.”

...

In the time that followed, Nate and I sensed that this would end up before the ZBA in some fashion, especially when people learned of the Heritage plans. We went back and forth and I made the decision to issue the permit. I suspect that the ZBA will slap my hands for issuing the permit and perhaps not being more forceful in sending them in for a SP. I suspect that they may overturn my decision to issue the permit and force a SP hearing.

**Exhibit 391.**

172. In an October 27, 2014 e-mail to a then-member of the Board of Selectmen, Mr.

Dunham stated:

The way Heritage treats people is terrible which is why they're having problems. Nate J. and Paul recommended last February that they simply file for a special permit through the ZBA . . . Instead, Heritage tried to ram everything down our throats – remember all those bullying e-mails and calls on issuing the permit?

**Exhibit 402.**

173. In an affidavit filed in this litigation, Mr. Spiro testified that “It was and is also my determination that, even if the proposed Aerial Adventure Exhibit were not otherwise allowed by right as a museum use, it would have a significant educational component that would afford the proposed project exemptions from zoning use regulations under the Dover Amendment of G.L. c.40A, §3.” **Exhibit 99** (Spiro Affidavit, ¶ 9).

174. When shown this statement and asked at deposition “what is the significant educational component of the [P]roject,” to which he was referring in this portion of his affidavit, Mr. Spiro answered by testifying: “it’s my belief that if someone learns a bit more about their confidence in themselves and doing certain things, that’s educational.” Trial Tr., Vol. 1, p. 102, l. 25 – p. 103, l. 2.

175. When, directly after uttering that testimony, Mr. Spiro was asked “what makes that educational,” Mr. Spiro responded by testifying: “Because they learn things.” Trial Tr., Vol.

1, p. 103, ll. 2-4. Directly thereafter Mr. Spiro agreed that it is “true” that “[y]ou can learn things doing just about anything.” Trial Tr., Vol. 1, p. 103, ll. 4-5.

176. Directly thereafter Mr. Spiro was asked: “So under that logic anything would be entitled to Dover Amendment protection, wouldn’t it?,” and Mr. Spiro responded to this question by testifying: “I would suppose so.” Trial Tr. Vol. 1, p. 103, ll. 5-8.

177. Mr. Spiro admitted that although he believed that the Project’s elements would “lead you above the gardens below,” he does not know if there are gardens below any of the Project components. Trial Tr., Vol. 1, p. 67, l. 22 – p. 68, l. 6.

178. Mr. Spiro testified that he knows “nothing about the workshops that are provided according to Heritage in connection with the Project.” Trial Tr., Vol. 1, p. 68, ll. 7-10.

179. Mr. Spiro admitted that he had stated that he “would be inclined to view [the Project] as some sort of amusement,” and the ZBL at all salient times has prohibited amusement parks in all zoning districts. Trial Tr., Vol. 1, p. 45, ll. 17-20; **Exhibit 392; Exhibit 100** (ZBL).

180. When he determined that the Project was entitled to Dover Amendment protection, Mr. Spiro incorrectly believed that before Climbers could participate in the Aerial Courses, they would be required to receive “educational instruction” concerning “the area, the rhododendrons, and all of those things that are part of the park.” Trial Tr., Vol. 1, p. 68, ll. 11-14; Vol. 1, p. 70, ll. 5-15.

#### **VI. Distinction Between Museum and Aerial Adventure Park**

181. In an affidavit filed in this litigation, Mr. Spiro testified that it is his determination that the Project “is allowed as part of, and at least accessory to, the Museum and Garden uses already operating by-right.” **Exhibit 99** (P. Spiro Affidavit, ¶ 8).



182. Mr. Spiro testified that “a museum exhibit would be anything that the museum felt it was part of their purview to operate, i.e., a carousel, cars and vehicles, gardens, American history museum, et cetera.” Trial Tr., Vol. 1, p. 70, ll. 16-20. Similarly, Mr. Spiro essentially acknowledged the absurd proposition that under his logic, a permissible museum use would be anything that Heritage declares it to be. Trial Tr., Vol. 1, p. 70, l. 21 – p. 71, l. 9.

183. There is nothing on display in connection with the Project. Exhibit 100 (ZBL, “Definitions,” p. 81).

184. Nor does Heritage itself genuinely regard the Project as a bona fide museum use or exhibit, but took pains to refer to the Project publicly as an “exhibit” merely as window-dressing, to “help dispel any zoning issues and keep from triggering any other issues.” **Exhibit 101; Exhibit 102; Exhibit 103; Exhibit 104.**

185. On March 6, 2014, Ms. Spear reassured Mr. Azarm that despite Heritage’s efforts to present the Project as a museum exhibit, “As you and I discussed, we’ll determine the level of interpretation that makes sense and doesn’t get in the way of fun in the trees, so don’t worry about the interpretation language. I don’t see much more than what you had at the Discovery Museum. From the Town perspective, we need to position it as just another exhibit, albeit an unusual one.” **Exhibit 101.**

186. Heritage’s own marketing literature omitted the Project from lists of the Museum’s exhibits for 2015. **Exhibit 103; Exhibit 104.**

187. Each of Heritage’s school “educational programs include admission to the Heritage grounds and exhibits as well as unlimited rides on [Heritage’s] vintage 1908 Looft carousel.” **Exhibit 105; Exhibit 106.** The Aerial Adventure Park requires a separate admission fee.

188. In discussing pricing for Park admission tickets, Heritage and Outdoor Ventures exchanged a "Pricing Sheet" that stated: "TAX NOTE: From the Mass.gov site I find "Admission sales: Sales of tickets to such activities as sporting and amusement events are exempt." So the rates below do not include any allowance for sales tax." **Exhibit 107.**

189. The Adventure Park availed itself of this tax protection for sporting and amusement activities, as there is no sales tax assessed with respect to amounts paid for admission to the Project. **Exhibit 108.**

190. Outdoor Ventures and Adventure Park LLC officials discussed seeking to avoid paying Park employees overtime compensation on the grounds that the Aerial Adventure Park constitutes an amusement park. **Exhibit 356.**

191. The Project features no display of any inanimate objects of lasting interest and value. See Exhibit 100 (ZBL, "Definitions," p. 81).

192. After seeing that Outdoor Ventures had described the Project as an "aerial forest adventure park" in the weeks preceding the Board's hearing in this matter, Ms. Spear urged Ms. Early to "reinforce with [Outdoor Ventures' Communications Director, Anthony Wellman] that for the moment we have to call it the Aerial Adventure Experience or Exhibit." **Exhibit 109.**

193. Approximately one week later Melissa Houle, of Outdoor Ventures, asked Mr. Chizek what he meant in an e-mail in which he referred to the "Aerial Experience," and Mr. Chizek responded: "Heritage Adventure Park LLC (AKA around here for political reason – Aerial Experience)." **Exhibit 110; Exhibit 339.**

194. After reading a proposed media advisory that Heritage's public relations firm had drafted for the Project in the weeks leading up to its opening in May, 2015, Mr. Wellman stated: "[t]his doesn't do it for me . . . [f]or one, I do not like us headlined as an 'exhibit.'" **Exhibit 340.**

195. In discussing Heritage's use of the phrase "Aerial Adventure Exhibit at Heritage" on its website, and its efforts to avoid using the word "park" in the Aerial Adventure Park's official name, Mr. Wellman further stated that such "phrasing would not be advisable long-term" and that Heritage officials had "gotten themselves into a pickle by referring to it as anything else but our real name." **Exhibit 341; Exhibit 342.**

196. Describing how to rectify Heritage's "euphemism," Mr. Wellman betrayed Outdoor Ventures' recognition of the distinction between the Aerial Courses and the Ground Path, characterizing the former as an "outdoor recreation for families" and the latter as Heritage's "botanical exhibit" and the "free accompanying exhibit aspect," despite Heritage's disingenuous attempt to merge the two conceptually as a unified singular exhibit for zoning expedience. **Exhibit 343.**

197. Mr. Hines also acknowledged this distinction as he was designing the website, confessing that although he was trying to give the Ground Path "equal billing" to the Aerial Courses on the website, he lacked information regarding the Ground Path, stating: "Beyond 'educational walking trails' and a reminder that these trails are free.....I don't have much info!" **Exhibit 344.**

198. Ms. Hines likewise acknowledged this distinction in an e-mail to Shannon Bechard of the Sandwich Public Schools, in which, in response to Ms. Bechard's question asking "where will the educational portion take place," Ms. Hines responded that "[t]he educational portion will take place in the pathways and areas below and around The Adventure Park." **Exhibit 89.**

199. The Project easily could be removed and disassembled without physical damage to trees or other structures. Trial Tr., Vol. 1, p. 57, l. 24 – p. 58, l. 12.



200. The Park employs two full time employees, namely a Park Manager and an Operations Manager. **Exhibit 112**; Trial Tr., Vol. 5, p. 65, ll. 19-21. The Park also employs various part time employees (the "Part Time Employees"). Trial Tr., Vol. 5, p. 65, l. 25 – p. 66, l. 3.

201. There is no requirement that the Part Time Employees have college degrees. Trial Tr., Vol. 4, p. 26, ll. 11-13.

202. Heritage does not participate in the hiring of Park employees. Trial Tr., Vol. 4, p. 19, ll. 13-16.

203. No Heritage employees have any role in the operation of the Aerial Courses. Trial Tr., Vol. 4, p. 36, ll. 20-22; Vol. 2, p. 125, l. 24 – p. 126, l. 2.

204. Nor were the Aerial Courses formulated strategically to synch with any educational objective or mission of Heritage. In fact, after the Building Inspector had issued the Building Permit for the Project, and in the weeks immediately preceding the Board of Appeals' hearing in this matter, Heritage lacked knowledge of, and had to ask Outdoor Ventures regarding, basic information about the Aerial Courses, including the number of Aerial Courses that would be included in the Project, the length of such courses and other basic details. **Exhibit 114.**

## **VII. Construction and Opening of the Aerial Adventure Park**

205. Outdoor Ventures opened the Aerial Adventure Park in May of 2015, after completing construction of it in the winter months of 2014-2015.

206. As constructed the Aerial Adventure Park is markedly different from the Project as proposed and approved. **Exhibit 23; Exhibit 115; Exhibit 54**; Heritage's Second Supplemental Answer to Interrogatory No. 7.

207. For example, the drawing presented to and approved by the Historic District Committee showing the layout of the Project depicted the Aerial Adventure Park courses (comprising aerial zip lines, ropes courses and the like suspended in trees) extending across Shawme Road to 67 Grove Street, an entirely different parcel of land. **Exhibit 23**; Vol. 4, p. 30, ll. 7-10.

208. Such drawing also neglected to depict the size and location of two yurts and other associated structures, and the Committee was never presented with, and thus never approved, qualifying building plans as required. **Exhibit 23**; **Exhibit 115**; **Exhibit 54**.

209. The revised Project plans submitted months later to the Building Inspector depicted the Aerial Adventure Park's yurts and structures in other locations that also are substantially different from the current Project layout. **Exhibit 115**; **Exhibit 54**; Trial Tr., Vol. 1, p. 7, ll. 9-11.

210. After the Sandwich Historic District Committee issued the COA, and after the Building Commissioner issued the Building Permit, the Project plans were revised to:

- (a) move by approximately 200 feet the location of the yurt structures associated with the Project. Trial Tr., Vol. 4, p. 30, l. 25 – p. 31, l. 3; Heritage's Second Supplemental Answers to Interrogatories, Answer No. 7.
- (b) Add decking.
- (c) Add a ramp.

**Exhibit 115**; **Exhibit 54**.

211. Several structures within the aerial courses extend to at least 10 feet higher than the 35 foot maximum height allowed in an R-1 Zoning District under Section 2600 of the ZBL,

Exhibit 114, and are located as close as 22 feet from the public way, in violation of the 30 foot minimum setback area set forth under Section 2600 of the ZBL. **Exhibit 100; Exhibit 54.**

212. The Aerial Adventure Park offers approximately 280 makeshift parking spaces on a large grass field area on the Property that has not been permitted as a parking area, is not properly screened by trees or otherwise compliant with the ZBL, and is accessed via an unapproved curb cut located along a Town-designated scenic road. **Exhibit 371; Exhibit 100** (ZBL Sections 3100-3540).

213. Prior to the opening of the Adventure Park, this large grass field was vacant and not in customary use. Trial Tr., Vol. 6, p. 25, ll. 7-14; Vol. 3, p. 68, ll. 14-23; Vol. 2, p. 144, ll. 2-11.

214. The grass parking area is not an all-weather surface and includes parking spaces within the 20 foot minimum setback from Shawme Road in violation of Section 3130 of the ZBL. **Exhibit 54; Exhibit 100.**

## **VIII. Project Impacts**

### **A. Traffic**

215. The Project has resulted in significant additional traffic volume in the Plaintiffs' insular neighborhood, access into and out of which is provided solely by the same roads that provide the exclusive means of access to and egress from the Aerial Adventure Park, namely Shawme Road, Grove Street and Pine Street. Trial Tr., Vol. 7, p. 45, ll. 10-17; Vol. 2, pp. 145-150; Vol. 3, pp. 13-17; Vol. 3, p. 82, ll. 16-24; Vol. 3, p. 84, ll. 10-14; Trial Tr., Vol. 6, p. 25, l. 25 – p. 26, l. 9; Vol. 6, pp. 29-30.

216. A comparison of traffic counts taken on August 14, 2015 (when the Park was open) and December 4, 2015 (when the Park was closed) illustrates that the Project accounted for



at least 611 additional vehicle trips in the neighborhood on August 14<sup>th</sup>. Trial Tr., Vol. 7, pp. 38-39; **Exhibit 411**.

217. Applying the Institute of Transportation Engineers Trip Generation Manual's calculated weekday daily trip generation, 600 daily vehicle trips is the approximate traffic volume that would be generated by approximately 55 single-family houses or 94 condominium units. Trial Tr., Vol. 7, p. 40, l. 21 – p. 41, l. 1. Currently there are 160 single-family homes and 121 condominium units (281 total) currently located in the neighborhood. Trial Tr., Vol. 6, p. 2, ll. 7-14.

218. Throughout 2015 the Project resulted directly in a proliferation of trespassers to Plaintiff abutters' property at Highview Condominiums ("Highview"), as on a daily basis several Aerial Adventure Park customers drove onto Highview Drive, the private driveway serving Highview residents such as Plaintiffs Mr. Morgan and Ms. Price. Trial Tr., Vol. 3, pp. 13-16; Vol. 2, p. 144, ll. 20-22; Vol. 2, p. 148, l. 21 – p. 150, l. 17; Vol. 7, pp. 63-64; **Exhibit 116**.

219. In 2016, a substantially greater number of Aerial Adventure Park customers drove onto Highview Drive. Trial Tr., Vol. 2, p. 150, ll. 21-24. Heritage placed a non-standard sign at the corner of Shawme Road and Highview Drive directing motorists to the Aerial Adventure Park, after a resident of Highview had placed a homemade sign for the same purpose. **Exhibit 117A-117C**; Trial Tr., Vol. 2, p. 150, l. 25 – p. 151, l. 14; Vol. 3, p. 16, ll. 7-17.

220. The increase in traffic volume passing 25 Pine Street has exacerbated the safety hazard that Ms. Andrews confronts in negotiating the limited and inadequate sight distance that exists where her driveway intersects Pine Street. Trial Tr., Vol. 7, pp. 47-52; Vol. 3, p. 82, l. 25 – p. 84, l. 1.

221. The increase in traffic volume on Pine Street has exacerbated the safety hazard that Ms. Sullivan confronts in negotiating the limited and inadequate sight distance that exists where her street, Jonathan Lane, intersects Pine Street. Trial Tr., Vol. 7, pp. 51-52; Vol. 6, p. 26, ll. 3-9.

222. This additional traffic has facilitated associated nuisances such as litter along such roads and on Plaintiffs' properties. Trial Tr. Vol. 3, p. 15, l. 10; Vol. 3, p. 46, ll. 10-25; Vol. 6, pp. 29-30; Vol. 2, p. 149, l. 4; **Exhibit 372**.

223. The increased traffic resulting from the Project further deteriorates the condition of Shawme Road, causing and exacerbating pot holes, ruts and similar conditions. Trial Tr., Vol. 7, p. 52, ll. 10-24; Vol. 2, p. 145, l. 16 – p. 146, l. 2; Vol. 2, p. 148, ll. 2-6; Vol. 3, p. 13, ll. 6-14; Vol. 6, pp. 29-30.

224. The increased traffic on Shawme Road resulting from the Project has pushed a gravel substance, dirt and debris onto the edge Highview Drive, creating a safety hazard, especially for motorcyclists such as Mr. Morgan. Trial Tr., Vol. 3, p. 14, ll. 17-25; Vol. 3, p. 59, ll. 20-22; Vol. 3, p. 62, ll. 9-11.

225. There are no sidewalks on Shawme Road or Pine Street, and sidewalks are generally absent throughout the neighborhood. Trial Tr., Vol. 7, p. 45, l. 25; Vol. 6, p. 30, l. 3; Vol. 3, p. 82, ll. 12-15.

226. Shawme Road features a variety of poor conditions that render it inadequate, including its unpaved, uneven surface, narrow width, erosion, road edge drop-offs, boulders/rocks and inadequate or non-existent guardrails, which road conditions are problems that the Aerial Adventure Park traffic exacerbates. Trial Tr., Vol. 7, p. 52, ll. 10-24; Vol. 2, p. 148, ll. 2-6; Vol. 6, pp. 29-30; Vol. 3, p. 13, ll. 6-9; **Exhibit 118A-118GG**.

227. Increasing the number of vehicle trips in the neighborhood increases the number of pedestrian and vehicle conflicts and risk of collision. Trial Tr., Vol. 7, p. 53, ll. 7-16; Vol. 7, pp. 64-65.

228. The increased volume of traffic on Shawme Road and Highview Drive has reduced Ms. Price's and Mr. Morgan's pedestrian safety and access on Shawme Road and Highview Drive. Trial Tr., Vol. 7, p. 53, ll. 7-16; Vol. 7, pp. 64-65; Vol. 2, p. 146, l. 3 – p. 148, l. 2; Vol. 3, p. 13, ll. 6-14; Vol. 6, pp. 29-30; **Exhibit 118A-118GG**.

229. In effect, the Aerial Adventure Park has overtaken neighboring streets and essentially treated them as internal roads.

230. The neighborhood surrounding the Aerial Adventure Park is insular, and the primary destination of motorists in such neighborhood is either Heritage, the Aerial Adventure Park, or the residences of the motorists. Trial Tr., Vol. 6, p. 105, ll. 2-9; Vol. 7, p. 45, ll. 17-22.

231. After the Aerial Adventure Park opened to the public, Heritage undertook significant changes to its parking facilities, to move parking spaces closer to and otherwise accommodate the Adventure Park. **Exhibit 370A-370Q** (aerial photographs); Exhibit 111. Such parking changes, and the Park itself, have dramatically changed the character and appearance of Shawme Road and the Plaintiffs' neighborhood. **Exhibit 370A-370Q; Exhibit 118A-118GG**. Trial Tr., Vol. 7, pp. 56-57; Vol. 2, p. 152, ll. 7-15.

232. The streets surrounding the Aerial Adventure Park, including Shawme Road, Pine Street and Grove Street, are residential, scenic and rural in appearance. Trial Tr., Vol. 3, p. 12, ll. 9-24.

233. The parking areas that are used in connection with the Aerial Adventure Park, or that have been modified since the Aerial Adventure Park was built, have since the Project was



constructed changed from a rustic or scenic appearance to a formal and more urbanized appearance.

**B. Diminution in Property Values**

234. When Ms. Price was considering whether to purchase her property at Highview, it was represented to her in marketing communications that the abutting property at 0 Shawme Road was not commercially developable. Trial Tr., Vol. 2, p. 136, ll. 3-10.

235. The Aerial Adventure Park has reduced the values of the Plaintiffs' properties, respectively, by between 10-16% individually. **Exhibit 417.**

236. This diminution results from various causes, including among others increased traffic volumes, diminished pedestrian accessibility/walkability (including for Ms. Price and others), the conditions of the neighborhood and commercial nature of the Project, among others. Trial Tr., Vol. 9 (testimony from October 31, 2017 trial day), pp. 26-28; Vol. 10 (testimony from November 1, 2017 trial day), pp. 93-94.

237. The Project-created or exacerbated traffic and pedestrian safety issues are among the reasons for the reductions in values of the Plaintiffs' properties and thus impact the Plaintiffs uniquely. Trial Tr., Vol. 9 (testimony from October 31, 2017 trial day), pp. 26-28.

238. As a result of the insular nature of the Plaintiffs' neighborhood, surrounded by, and accessible only by way of, Route 130, residents of this neighborhood, such as the Plaintiffs, are uniquely impacted by the Project-created or exacerbated traffic and pedestrian safety problems.

239. Properties in the neighborhood surrounding the Project, including condominium units at Highview Condominiums, have since the opening of the Project remained on the market for longer periods of time and/or sold at lower prices compared with properties outside of the

neighborhood and throughout the town. Trial Tr., Vol. 9 (testimony from October 31, 2017 trial day), pp. 22-23.

240. There is a cost to longer market time that translates to loss of value, including downward price pressure, taxes, insurance and other costs, as well as the potential loss of an opportunity to purchase or finance a successor home. Trial Tr., Vol. 9 (testimony from October 31, 2017 trial day), p. 23, ll. 14-15.

**C. The Project's Planned Post-Litigation Expansion**

241. Outdoor Ventures and Heritage have projected that approximately 50,000 or 60,000 people will visit the Aerial Adventure Park in the fourth year of its existence (i.e., 2018), with substantial commensurate incremental increases annually in the interim. **Exhibit 320;** Exhibit 3.

242. Other documents reflect that Outdoor Ventures' projections are regarded as "very conservative." **Exhibit 6** (HER-013633).

243. In 2016, Project attendance levels increased dramatically, to 31,145 Climbers. **Exhibit 95.**

244. Park operators plan to achieve the Park's anticipated growth by operating at night, increasing the number of climber harnesses and briefing stations, adding aerial courses, expanding the Park physically, and reducing the time of a climber's ticket, among other possible strategies. **Exhibit 111, Exhibits 321-338.**

245. Outdoor Ventures and Heritage always have intended that the Park would expand physically. For example, although the Aerial Adventure Park currently comprises five courses, the Lease Agreement between Heritage and The Adventure Park at Heritage Museums and

Gardens, LLC expressly contemplates the construction of “approximately 8 courses.” **Exhibit 14** (Lease Agreement, Section 2(b)); **Exhibit 3**.

246. On October 22, 2013, Ms. Spear circulated notes that she prepared during a meeting with Mr. Azarm, in which she stated that Outdoor Ventures “would anticipate building 5-6 trails the first year then expanding with an additional 5-6 in the second year.” **Exhibit 293**.

247. Consistent and contemporaneous with that proposal Heritage approved a Master Plan that depicted the aerial adventure park with aerial courses extending virtually up to Highview’s border. **Exhibit 8; Exhibit 283; Exhibit 404**.

248. Heritage has admitted that the land area leased to The Adventure Park LLC for purposes of operating the Aerial Adventure Park extends beyond the area that the Project physically occupies. Trial Tr., Vol. 4, p. 50-51.

249. The Project Construction Agreement between Outdoor Ventures and The Adventure Park at Heritage Museum and Gardens, LLC and the Operating Agreement of The Adventure Park at Heritage Museum and Gardens, LLC include language stating that “[i]f the project venue is received by the public as expected, a phase two could include an expansion of the venue to include courses for younger children and/or a canopy walkway for all visitors to allow them to view the beautiful grounds and rare plantings from above.” **Exhibit 19; Exhibit 15**.

250. Outdoor Ventures and Adventure Park LLC intend to expand the Project physically as soon as this litigation concludes, and have refrained from doing so to date only to make the Project seem less obtrusive, in an attempt to artificially bolster Heritage’s attack on the Plaintiffs’ standing. **Exhibit 111; Exhibit 321; Exhibit 322; Exhibit 323**.



251. For example, during the Board's quarterly meeting of November 4, 2015, Heritage and Outdoor Ventures discussed among "Long Term Improvements" the intention to "[m]ake the park bigger in 2017 or 2018" by "[a]dding practice lines and possibly 2 more courses," as well as "Add[ing] some minor climbing/jumping areas." Exhibit 321. The minutes state, however, that the "Lawyer suggested not to build anything at this time until the suit is adjudicated" and that "Heritage noted . . . that no further building can happen until the suit is settled." Id.

252. At the Board's next quarterly meeting, on March 18, 2016, the Board discussed that there would be "[n]o improvements nor any expansion due to litigation," and that "courses should be expanded and briefing stations and practice lines improved in the future." Exhibit 111.

253. The Board continued this dialogue at its ensuing quarterly meeting of July 7, 2016, discussing that "[t]he only way to increase climbers and ultimately the balance sheet is to expand the park and its courses." **Exhibit 322.**

254. At this meeting the Board planned its prospective expansion in increasingly concrete terms, validating the facts that the Adventure Park LLC intends to expand the Project physically and move it closer to the Plaintiffs' property at Highview Condominiums. Id.

255. Namely, the Board again discussed adding "[m]ore courses, particularly beginner courses, and additional briefing/practice stations," and addressed the following questions:

- When will be a good time to increase the size of the park? Attorneys say to not do anything now.
- Are there ways to make permitting less onerous; can we build further into the woods, avoiding an application to the historic district? If an application does not have to be filed with the historic district, maybe the application to expand could be filed sooner. Ellen requested that Bahman make a visit to the park and walk the grounds with her to discuss expansion areas.

- The current briefing/practice stations are very visible now; where could the new ones go to reduce visibility?

Id.

256. During the Board's discussion of the "Status of HAP improvements" at its October 6, 2016 meeting, Mr. Azarm "brought up that [Adventure Park LLC/Outdoor Ventures] would like two more briefing stations," and the Board discussed that "HAP has delayed improvements up until now . . . [i]f and when we can increase the courses of the park revenue will increase significantly. This is slated to happen in 2018, but all parties are willing to do this earlier if possible." **Exhibit 323.** On September 19, 2017, several months after receiving Plaintiffs' proposed findings summarizing all of the evidence that Heritage and Outdoor Ventures intend to expand the Aerial Adventure Park's operations, Heritage served documents disclosing to the Plaintiffs that it "is contemplating adding three new courses to the Adventure Park," for a total of eight courses. **Exhibit 362.**

257. Independent of its intent to add aerial courses and expand the Park, to continue to grow Climber volumes the Adventure Park LLC intends to increase Park capacity by adding harnesses and briefing stations, and truncating the duration of a Climber's visit. At its quarterly meeting on March 18, 2016, the Adventure Park LLC's Board discussed that "HAP's funnel size for reservations will be 10 people every 15 minutes," and that "HAP's funnel size is driven by harnesses (max. capacity) and infrastructure (briefing stations)." **Exhibit 111.**

258. In an e-mail on July 22, 2015, Mr. Azarm stated: "Regarding improving revenue generation and harnesses, one [idea] . . . is cutting the time of the ticket. Right now we are selling a two hour ticket but giving people 2 hours and 20 minutes, we should remove the 20min right away so that harnesses can be turned over more quickly." **Exhibit 324.**

259. An e-mail exchange between Ms. Salokangas and Mr. Azarm on January 13-14, 2016, reflects that this “funnel size” of “10 people every 15 minutes” was “based on group harnessing and the two current practice [i.e. briefing] stations” and would increase upon the contemplated post-litigation construction of a “third” practice/briefing station. **Exhibit 325.**

260. From the Project’s inception Adventure Park LLC has intended to increase the Park’s capacity by adding harnesses, and already it has begun doing so. The Park began with 120 harnesses “to start.” **Exhibit 122.** Mr. Azarm explained, however, that while “[t]hat is the number of harnesses we start with for a park this size,” Park operators “could go to about 150 harnesses which would bring the daily capacity to 600 per day (150 harnesses x 4 two hour sessions). 110 harnesses give us a daily capacity of 480 per day.” **Exhibit 123.**

261. Several months later, at its quarterly meeting on November 4, 2015, the Adventure Park LLC Board coordinated to add even more harnesses, discussing the Board’s “Plan to add more harnesses [in/for 2016],” that Mr. Hines and Mr. Azarm “will purchase additional harnesses,” and that the Park’s “[c]apacity is 150 people.” **Exhibit 321.**

262. The Adventure Park LLC also intends to add briefing stations. In an e-mail to Ms. Salogangas on November 4, 2015, Mr. Hines advised that although the Adventure Park LLC would not be expanding the number of courses “for 2016” due to the existence of “[t]oo many political issues at the moment,” he had “[c]onfirmed with [Mr. Azarm]” that “we plan to add a 3rd [briefing] station” at the Park. **Exhibit 326.**

263. That day Mr. Azarm mentioned this plan at the Board’s quarterly meeting. **Exhibit 223.** Heritage responded that “no further building can happen until the suit is settled,” although Ms. Spear “suggested putting a briefing station on the other side of the road on museum property.” Id.



264. At its two ensuing quarterly meetings on March 18 and July 7, 2016, the Board continued to discuss the addition of “more briefing stations, separate practice lanes, expanded courses,” Exhibit 207, and “[m]ore courses . . . and additional briefing/practice stations,” and contemplated undertaking such improvements following the conclusion of this litigation.

**Exhibit 322.**

265. Outdoor Ventures and the Adventure Park LLC also intend to continue to expand the Park’s hours of operation. For example, in 2016 the Aerial Adventure Park opened at 8:00 a.m. and closed at 8:00 p.m., thus increasing by three hours its 2015 operating hours of 9:00 a.m. to 6:00 p.m. **Exhibit 42.**

266. Adventure Park LLC intends to continue this increase and offer “night climbing” (defined as “anything past 8:00 p.m.,” see Exhibit 326, following the conclusion of the instant litigation. Trial Tr., Vol. 6, p. 195, ll. 6-14.

267. For instance, on March 11, 2015, several months after the Plaintiffs filed the Complaint and approximately two months prior to the Aerial Adventure Park’s opening, Ms. Early asked Melissa Houle of Outdoor Ventures a series of questions concerning the Aerial Adventure Park, for use in creating marketing materials, including “[w]ill you be open at night?” **Exhibit 352.** Ms. Houle responded that day via e-mail stating “We plan to offer night climbing in the future (Ellen [Spear] will decide how she wants to answer this).” Id.

268. In an e-mail exchange with Ms. Early the following day concerning the contents of draft Project marketing materials, Ms. Spear stated “[w]e cannot say we are open nighttime.” **Exhibit 124.**

269. In a separate e-mail exchange on March 12-13, 2015, an official of The Adventure Park LLC responded to an Outdoor Ventures official: “Definitely no mention of night climbing! :)” **Exhibit 345**.

270. In this time frame, as Adventure Park LLC officials were developing the Park’s website, Park Operations Manager, Kelly Hines, sent an e-mail to John Hines suggesting that “[s]ince we won’t have night climbing *at first* we might want to consider replacing” a photograph depicting “what looks like a night climb,” to which John Hines responded “Yup. No night pictures on HAP.” **Exhibit 327** (emphasis added).

271. Records generated in connection with Heritage’s due diligence vetting of Outdoor Ventures in 2013 demonstrate that Heritage also contemplated night operations from the outset of the Project’s development. **Exhibit 5** (internal memorandum indicating that Heritage contacted operators of Outdoor Ventures’ aerial adventure parks for the purpose of learning about “night lighting” and enumerated among a list of questions for such references “Do you have night lighting for your park?”).

272. When Heritage sent an e-mail to Outdoor Ventures on October 6, 2014 stating that the Aerial Adventure Park’s hours of operation would be 10 a.m. – 5 p.m., Mr. Hines circulated e-mails stating: “[W]e never agreed to such restricted hours,” **Exhibit 328**, and “10-5??????? THATS INSANE! They are going to kill the business before it starts by making promises to the community that will handcuff the business.” **Exhibit 329**.

273. Mr. Wellman responded to Mr. Hines, stating “[m]y guess is that this information is for their PR efforts. I knew night climbing was already an issue so didn’t mention it. Didn’t say we’d do it or not do it . . . [t]hey want to handle with their PR agency.” **Exhibit 328**.

274. Mr. Wellman also responded to Heritage, cautioning that “[i]f you set a time like 10-5 at this time, you might be tying your hands in the future. That could be very limiting. I’d avoid operating hours specifics and if you absolutely must say something it might be along the lines of, ‘typical business operating hours’, which is a flexible term.” **Exhibit 331.**

275. In a contemporaneous transmission to Mr. Wellman, Mr. Hines further lamented that “over the summer [Heritage] put stuff on the street that will bite us if they continue to say it: All Reservation. very [sic] low climber numbers, very low car counts, no mention of night climbing, etc.” **Exhibit 330.**

276. In an e-mail to Mr. Azarm on March 12, 2015, Mr. Hines stated: “Grapevine say [sic] you said ‘no lights this year at HAP [i.e., the Project].’ I want to push back against that. This park can not make real money without night climbing. the season and days are just too short. It is essential that we install lights this summer and ease into night climbing in Aug, so that we can really push it in the fall.” **Exhibit 332.** Mr. Azarm responded: “I’m fine with it as long as the Museum gives us the go ahead. I can put them in anytime.” Id.

277. In connection with this discussion the Adventure Park LLC placed on its next quarterly board meeting agenda an item to discuss “2016 Night climbing.” **Exhibit 333.**

278. Ultimately Outdoor Ventures capitulated on this issue for the 2015 season, because Ms. Spear “insist[ed] that the hours be limited to 9-6 until that can be changed,” based on “the legal strategy for the [instant] suit.” **Exhibit 334.**

279. Accordingly, on March 16, 2015, Outdoor Ventures’ then-Director of Operations, Missy Conner, circulated an e-mail internally advising that “due to the whole legal situation up in [the Aerial Adventure Park], the hours there for the season have changed” to “9-6 every day, spring summer and fall –until further notice.” **Exhibit 335.**



280. Even thereafter the parties contemplated expanding the Park's hours in 2015 if this lawsuit was dismissed within that season. In fact, Mr. Hines conveyed that he was "hopeful that we will be staying open until 8 or 9 by" August, in time for an event that the Park was trying to plan. **Exhibit 336.**

281. In the same communication, Mr. Hines emphasized that "[i]ts important that we not forget that success for HAP will require that we open earlier (8am) and stay open until 10 or 11. The combination of the short season and the current artificial constraints on [Park] hours greatly limit the potential for the park." Id.

282. Outdoor Ventures brooded over this issue in a July 21-23, 2015 e-mail exchange between Mr. Azarm, Mr. Hines and Mr. Laposata. **Exhibit 324.**

283. In such communications, Mr. Laposata enumerated potential strategies to increase the Park's revenue, stating: "Can we add harnesses to get more volume? . . . Can we extend hours? Sux [sic] when you sell your last ticket at 530pm [sic]. Can we add courses? . . . can we construct a different attraction on the same property? Monkey grove, labyrinth etc. [sic]." Id.

284. Mr. Hines responded:

Selling tickets from 9 to 3:30 is killing us. Lets open at 8. Lets sell the last ticket at 7, 7 days a week during the summer. That would DOUBLE our practical daily capacity. We will get cheap headlamps as needed and rope light the ground paths. A note about later hours: Based on several conversations with Ellen earlier this year, she said extended hours and/or night climbing were off the table until 'the situation settles down.' She objected to the idea of any late climbing. later hours and night climbing: I am a broken record on this point: it takes time to retrain an audience about our hours and activities. There are only 5 weeks left in the HAP summer season. If we wait until Sept to launch later hours and night climbing, few of our customers will get the message....

Id. (emphasis in original). At trial Mr. Hines admitted that he understood the phrase "settles down," as used in this excerpt, to refer to the instant lawsuit. Trial Tr., Vol. 7, p. 15, ll. 14-15.

285. Mr. Azarm responded that Mr. Laposata's "ideas . . . are good and should be discussed," and noted that "even though we are trying to limit our hours of operation because of the lawsuit, we can do special night climbs every once in a while, such as 'full moon climb' or 'first moon climb,' etc., without using lights." **Exhibit 324**.

286. Late that year, in a lengthy e-mail transmitted on November 4, 2015, Mr. Hines advised Ms. Salokangas that, with respect to the issue of "Operating Hours," "there will be a robust discussion of hours at the [Adventure Park LLC board] meeting," that an "8am [opening] is a no brainer," and that "selling ticket THROUGH 8 pm is also a no brainer." (emphasis in original). **Exhibit 326**. In the same e-mail Mr. Hines stated that, with regard to offering night climbing at the Park, "I am still pushing for night climbing by June. (last ticket sold at 8) 8-8 all summer :-)." Id.

287. Adventure Park LLC Board meeting minutes reflect that on the same day Mr. Hines expressed that he "feels that not staying open until 10pm will potentially decrease revenue by more than 20% during the summer," and that at such meeting Outdoor Ventures "propos[ed] to have [the Park] open til 10pm potentially Thur-Sun nights." **Exhibit 321**; Trial Tr., Vol. 7, pp. 11-12. At this meeting the Board contemplated that the hours of operation would "be expanded in steps (i.e., extend to begin at 8a in 2016 and then more in future years)." Id.

288. Months later, in an e-mail exchange on January 11-12, 2016 between Ms. Salokangas and Outdoor Ventures' Safety Operations Manager, Nick Krotki, regarding the issue of installing lights at the Aerial Adventure Park, Ms. Salokangas stated: "we are NOT approved yet for regular night climbing at HAP for 2016. John continues to push, but in light of pending legal decisions, we are on hold. However, we did get approved to hold a handful of individual night climbs." **Exhibit 337** (emphasis in original).

289. Within this e-mail thread Ms. Salokangas stated further: "I would love to be planning the lighting now; that's just how I operate. However, what I know is that the summary judgement [sic] for the legal situation will take place next month. If it's dismissed by the judge, the legal issues are somewhat over; whether or not HMG will permit night climbing after that is unknown event [sic] though John will push for it. if the judge allows everything to go to trial, there will be no night climbing this year as no one will know until Feb. when the trial would start and how long it would last." Id.

290. In a subsequent e-mail exchange months later with Mr. Hines, Ms. Salokangas explained the need for lighting at the Park, emphasizing "how dark it gets 'in the bowl' as we call it," and elaborating that "[o]ur tree canopy is think [sic] and because the park is in a u-shaped bowl, it gets dark pretty quickly after sunset . . . [o]ur staff really struggled last Fall to be able to see people, especially those who started a course using their '5-minute before end time' option to start a new course." **Exhibit 338.** Mr. Hines responded: "Ok – I hear you. Guess we need lights! lol." Id.

291. The Board again discussed this issue at its March 18, 2016 quarterly meeting, and the minutes from the meeting reflect that "Night Climbing" was "called off for 2016 season" only. **Exhibit 111.**

292. The Board again discussed this issue at its July 7, 2016 quarterly board meeting and, as the meeting minutes reflect, contemplated that the Park could generate "more revenue with extended hours, lights, and night climbing." **Exhibit 125** (7/7/16 board meeting agenda, including therein an item to discuss "Improvement timetables" under a heading entitled "Status of ongoing litigation"); **Exhibit 322.**



293. During its October 6, 2016 meeting the Board recognized that “[e]vents have been limited at HAP due to no night climbing.” **Exhibit 323**.

294. At trial Mr. Azarm testified that Outdoor Ventures and Heritage prospectively “are going to be discussing [night climbing] to see how and if we’re going to be doing it” and that “it will definitely be a discussion between” Heritage and Outdoor Ventures. Trial Tr., Vol. 5, p. 37, ll. 9-11.

295. That the Project will operate at night is transparent and inevitable, notwithstanding any attempts to shield this intention until the Project is insulated from legal challenge.

296. Such night operations would create obvious additional cognizable sources of aggravement, including from the installation of lighting that necessarily would be associated with night operations.

297. At trial, Mr. Azarm testified that as part of its night climbing operations, Outdoor Ventures features “music and other lights that dance to the music, with the different colors and so on . . .” Trial Tr., Vol. 5, p. 36, ll. 11-12.

298. Mr. Morgan and Ms. Price likely would be especially harmed, especially to the extent that the Project expands physically in the direction of Highview. The ZBL specifically protects against light pollution. **Exhibit 100** (see, e.g., Sections 1342, 3470 & 4151).

299. Increasing Climber counts would yield a commensurate increase in traffic volume associated with the Project. Trial Tr., Vol. 7, p. 41, ll. 2-5.

300. The additional volume of Climbers that Outdoor Ventures and Heritage project will generate an especially pronounced traffic impact within the Plaintiffs’ insular neighborhood.

301. For example, on August 14, 2015, the Project generated approximately 611 vehicle trips. Heritage's expert witness, Patrick Dunford, reported that on Friday, August 28, 2015, 1925 vehicle trips were counted on the roads comprising the exclusive means of access and egress into and out of the neighborhood, namely Shawme Road, Pine Street and Grove Street. Mr. Dunford attributed 536 of those vehicle trips to the Project. Trial Tr., Vol. 7, p. 42, l. 11 – p. 43, l. 18; **Exhibit 412**; **Exhibit 126**.

302. Based on the Climber count for August 14, 2015 of 223 Climbers, the Project generated 2.7 vehicle trips per Climber that day. Trial Tr., Vol. 7, p. 41, ll. 9-17. Further, averaging Heritage's traffic count and Climber data for August 27-29, 2015, suggests that there are approximately 2.28 vehicle trips per Climber per day (i.e. 1149 total vehicle trips and 502 total Climbers over the course of such dates). Trial Tr., Vol. 7, pp. 44-45.

303. In 2016 there were multiple days in which 360 or more Climbers visited the Park. Exhibit 95. Applying the above factor of 2.7 vehicle trips per Climber to 360 daily Climbers would yield a total of 972 vehicle trips associated with the Park on days in which the Park hosted 360 Climbers. Applying the above factor of 2.28 vehicle trips per Climber to 360 daily Climbers would yield a total of 821 vehicle trips associated with the Park on days in which the Park hosted 360 Climbers.

304. Mr. Azarm explained that the Park "could go to about 150 harnesses which would bring the daily capacity to 600 per day (150 harnesses x 4 two hour sessions). 110 harnesses give us a daily capacity of 480 per day." **Exhibit 123**. Mr. Azarm's statement assumed an eight hour day (i.e., four sessions of two hours each).

305. Applying the factor of 2.7 vehicle trips per Climber to 50,000 Climbers would yield a total of 135,000 annual vehicle trips attributable to the Project. Trial Tr., Vol. 7, p. 41, l.

25 – p. 42, l. 10. Applying the factor of 2.28 vehicle trips per Climber to 50,000 Climbers would yield a total of 114,000 annual vehicle trips attributable to the Project. Trial Tr., Vol. 7, p. 45, ll. 1-9.

306. Annual vehicle volumes associated with the Park could be increased by any of the following changes to the Park, among other potential causes: (1) an increase in the number of days of operation; (2) an increase in hours of operation; (3) an increase in the number of harnesses in use at the Park; (4) a decrease in the duration of a Climber's allowed visit; (5) an increase in the number of briefing/practice stations; or (6) an increase in the number of aerial courses. Trial Tr., Vol. 7, p. 46, ll. 3-25.

307. The Defendant's projected increase in Climber attendance will dramatically heighten the Plaintiffs' already substantial property-specific traffic impacts.

**D. Ongoing and Future Project Parking Facilities and Road Work**

308. As part of the Project's continued expansion, and even independent of it, Heritage and Outdoor Ventures have completed, and plan to complete prospectively, various further work in connection with the Aerial Adventure Park, including the alteration or reconfiguration of nearby roads and parking facilities, lighting installations and fencing. **Exhibit 370A-370Q; Exhibit 111; Exhibit 321; Exhibit 322; Exhibit 323.**

309. For example, in 2013 and 2014 Heritage worked actively with Town officials to coordinate a major reconfiguration of nearby roads that would have closed a portion of Shawme Road, rendering it inaccessible by car for Highview residents such as Mr. Morgan and Ms. Price. **Exhibit 310**; Trial Tr., Vol. 1, pp. 124, ll. 16-18. Heritage specifically sought these changes in connection with the Project. See, e.g., Exhibit 399.

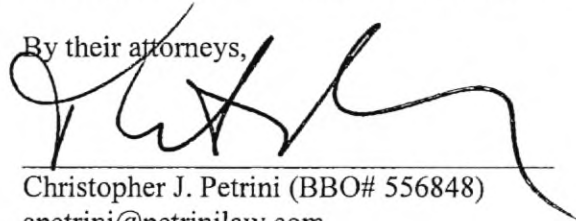


310. While Heritage purported to abandon these plans on the eve of the preliminary injunction hearing in this case, approximately seven months later, on July 20, 2015, Heritage and Town officials met to discuss Heritage's road plans, including (as is reflected in notes from the Town's files) the potential discontinuance of Shawme Road then-contemplated for 2016 or 2017. **Exhibit 394** (public record handwritten notes from Town files stating "Discontinue Shawme Rd? 1-2 yrs out?"); **Exhibit 406**; Trial Tr., Vol. 1, p. 129, l. 22 - p. 130, l. 4. In renewing these discussions in the summer of 2015, Ms. Spear emphasized to the Town that, with regard to Heritage's road plans: "[w]e remain committed to working with you to find money and solutions!" **Exhibit 406**.

311. This evidence and the strong nexus between the Project and Heritage's road plans reflect the strong likelihood that Heritage will renew the latter imminently if successful in this case, further exacerbating the harms to the Plaintiffs as a result of the Project.

Plaintiffs,  
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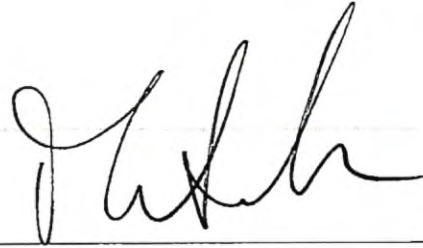
Dated: December 4, 2017

CERTIFICATE OF SERVICE

I, Peter L. Mello, counsel for the Plaintiffs in the above matter, hereby certify that on December 4<sup>th</sup>, 2017, I caused a copy of the foregoing document to be served by e-mail and first class mail upon the following counsel in the above case:

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A handwritten signature in black ink, appearing to read 'P. Mello', is written over a horizontal line.

Peter L. Mello

*2017.12.01 Plaintiffs' Proposed Findings (1915-00)*